Supreme Court, U.S.
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No.....

IN THE

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does either the sovereign immunity of the State of Nevada, or the qualified immunity of its officers, preclude tribal court jurisdiction in actions stating tort and constitutional claims against individually-named state officials, for official actions taken in Indian country with express permission of a tribal judge?

(2) Is decision on the question of tribal court jurisdiction over state officials properly bifurcated, with consideration of the tribal court's jurisdiction separated from, and antecedent to, decision on the officials' claims of sovereign and qualified immunity?

(3) Is the rule of *Montana v. United States*, 450 U.S. 544 (1981), creating a presumption against tribal court jurisdiction over non-members, limited to cases in which a cause of action against a non-member arises on lands within a reservation which are not controlled by the tribe?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners State of Nevada, William Molini, Rich Ellington, Michael Spencer, and Bill Fitzmorris (collectively the "State"), respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit, review of which is sought by this petition, is reported at 196 F.3d 1020 (9th Cir. 1999), as amended January 24, 2000, and is reproduced in the appendix hereto ("App.") at A-1 to A-23. The opinion of the District Court for the District of Nevada, entered on October 1, 1996, is reported at 944 F. Supp. 1455 (D. Nev. 1996), and is reproduced at App. B-1 to B-24.

Additionally, the final decision of the Nevada Intertribal Court of Appeals, dated May 13, 1994, is attached at App. C-1 to C-8.

JURISDICTION

The opinion of the Ninth Circuit was entered on November 9, 1999. The State's petition for rehearing and suggestion for rehearing en banc were denied by order dated March 9, 2000. App. D-1.

In the federal district court, the jurisdictional basis for challenging tribal court jurisdiction over state officials was federal question jurisdiction. 28 U.S.C.A. § 1331. Jurisdiction of the Ninth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The decision of the Ninth Circuit in this case holds, for the first time, that tribal courts may exercise jurisdiction in civil actions filed against state officials. The following facts give rise to this exceptional decision.

This case began with official actions taken by Nevada game wardens in 1990 and 1991, on the Fallon Paiute-Shoshone Reservation (the "Reservation"), located sixty miles east of Reno, and wholly within Nevada. The Reservation was established by authority of the Act of April 30, 1908, 35 Stat. 85, and subsequent enactments, and no treaties pertain to its existence.

Significantly, the actions of the game wardens were approved by a tribal judge. On two occasions separated by a year's time, one or more wardens seized different mounted bighorn sheep's heads from the on-reservation residence of tribal member Floyd Hicks. The wardens believed the property to be evidence of off-reservation poaching of bighorn sheep, in violation of state law. Before seizing the heads, warden Michael Spencer swore out search warrants, *see* Affidavits of Michael Spencer, App. E-1 to E-2 and F-3 to F-4, in a state justice court, then obtained approval from a tribal judge for execution of the warrants on the reservation. *See* App. at F-1 and G-1 (search warrants approved by Tribal Judge Rebecca Harold). The wardens also obtained accompaniment to the Hicks residence from tribal police officers. In each case, the seized property proved not to be evidence of crime, and was returned. Subsequently Floyd Hicks sued Warden Spencer in two separate actions, and named two other wardens and the administrator[1] of the Nevada Division of Wildlife (NDOW) in one of them.[2] The suits were brought in the same tribal court that had approved the warrants. Hicks named the State of Nevada as well as the officials in both their individual and official capacities. His complaints alleged that the wardens had not followed tribal code provisions pertaining to search and seizure. The original claims sounded in tribal and common law tort, and also purported to rely on the Indian Civil Rights Act, 25 U.S.C. §§ 1301 to 1341. App. at H-1 to H-17.[3] Mr. Hicks amended the

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[1] Even though he is named, no allegations have ever been made in any forum that Administrator (formerly Director) William A. Molini (now retired) participated in any of the actions complained of by Mr. Hicks.

[2] He also named the tribal judge who approved the warrants, and the tribal police who accompanied the state officers.

[3] For brevity's sake, only the complaint in CV-FT-91-034 is reproduced in the appendices. The complaint in CV-FT-92-031 is substantially similar. Subsequent proceedings treated the two cases as though consolidated.

complaints several times, and following Nevada's initiation of federal court action, dropped the State and official capacity defendants. The claims were also repeatedly amended, so that currently they sound in common law tort and federal civil rights law (i.e. 42 U.S.C. § 1983). App. at I-1 to I-5.

Before seeking relief in federal court, Nevada and its officials litigated the tribe's jurisdiction for almost three years in tribal court. From the inception, on motions to quash, the officials raised the State's and their own individual immunities as bars to the tribal court's jurisdiction. *See e.g.* App. at J-1 to J-7, Motion to Quash, and App. at K-1 to K-13, State's Supplemental Brief.

Twice the tribal trial court dismissed the actions, but ultimately the tribal appellate court reversed. The tribal court held that principles of state sovereign immunity and the individual defendants' qualified immunity did not prevent the tribal court from exercising jurisdiction over the state defendants, App. at L-1, and a three-judge appellate panel reiterated this holding. App. at C-4 to C-5.

At this juncture, the State filed an action in the Federal District Court for the District of Nevada, seeking declaratory and injunctive relief against the tribal court and Floyd Hicks. The State argued, as it had in tribal court, that the status of state officials precluded tribal court jurisdiction over them. The court denied the State its relief, determining dismissively that "the status of the state defendants as state actors [does not] argue persuasively against jurisdiction," 944 F. Supp. at 1468, (App. at B-15) and concluding:

> Plaintiffs have failed to prove the jurisdiction asserted by the tribe is affirmatively limited by federal law. No express congressional divestment of the tribe's presumed inherent jurisdiction, or "an overriding federal interest that would necessarily be frustrated" by the exercise of tribal jurisdiction, has been shown. Therefore, this court concludes that the Fallon Tribal

> Court has jurisdiction to adjudicate Hicks' claims against the state defendants in their individual capacities.

Id. (App. at B-15 to B-16) (citations omitted).

The State appealed to the Ninth Circuit on October 29, 1996. On October 7, 1997, the case was argued and submitted. Three days later, the case was withdrawn from submission. For two years thereafter, the case languished, being resubmitted on November 4, 1999, and decided on November 9, 1999.

In its decision affirming the lower court, the Ninth Circuit concluded that the State had exhausted its remedies on the issue of tribal court jurisdiction, thus making it "ripe for federal review. We conclude that the tribal court has subject matter jurisdiction over the claims brought by Hicks against the state officials." 196 F.3d at 1029 (App. at A-12).

The Circuit also ruled that the immunity questions were not exhausted in tribal court and therefore were not properly before the district court or the appeals court. *Id.* (App. at A-3).

REASONS FOR GRANTING THE PETITION

The State urgently suggests that its petition be granted for two reasons. First, the decision whose review is sought presents to this Court for direct review, for the first time, the question of tribal civil adjudicative jurisdiction over state officials. In deciding this case, the Ninth Circuit creates new federal law, which implicates fundamental federalism principles. It does this by elevating tribal courts to a new, constitutional status not warranted by the text or history of the Constitution; and it achieves this result by diminishing state sovereignty in a manner also unjustified by a faithful reading of the Constitution and decisions of this Court, which construe it. In addition, the decision sets out an onerous procedure for federal court review of claims of state immunity in tribal

court. Ultimately, all of these issues are peculiarly within the province of this Court to evaluate and decide.

The second reason for granting the petition is to reconcile inconsistent circuit court decisions addressing the import of this Court's opinions in *Montana v. United States,* 450 U.S. 544 (1981), and subsequent cases.

I. THE NINTH CIRCUIT COURT OF APPEALS HAS DECIDED IMPORTANT FEDERAL QUESTIONS ABOUT FEDERALISM, STATES, AND TRIBES IN A MANNER THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, AND WHICH IN ANY EVENT SHOULD BE RESOLVED BY THIS COURT DUE TO THEIR SIGNIFICANCE.

Both the federal district court and the Ninth Circuit decided the issue of the tribal court's jurisdiction as if the state officials were run-of-the-mill tort feasors. Virtually all analysis was committed to the subject of tribal sovereignty, and none to the aspects of state sovereignty which were equally present and affected. In their disregard for the status of the state officials, the courts have set the law upon a new and misbegotten course.

A. THE SUPREME COURT SHOULD EXAMINE THE NINTH CIRCUIT'S TREATMENT OF STATE SOVEREIGNTY, AND DEFINE THE EFFECT OF STATE IMMUNITY ON TRIBAL JURISDICTION.

1. Sovereign immunity.

The Circuit's holding in this case is that tribal courts have jurisdiction to hear actions against state officials. This holding recognizes no distinction among the tort claims, tribal claims, and federal civil rights claims attempted against the state officials. In so deciding, the Circuit necessarily determined that state sovereign immunity is not a jurisdictional bar in the tribal forum as to any claim. This is a remarkable holding in two regards, both of which deserve this Court's review. First, as addressed in this section, the decision imparts

new, limiting definition to state sovereignty. The obverse of this holding--a new, expansive definition imparted to tribal sovereignty--is the second reason for review by this Court, and will be discussed hereafter in Part I.B.

In this cause, the State of Nevada brings an example of the "anomalous and unheard-of proceedings or suits" against states which this Court disparaged in *Alden v. Maine*, 527 U.S. 706, 727 (1999), *quoting from Hans v. Louisiana*, 134 U.S. 1, 18 (1890). The Ninth Circuit's holding--that a tribal court may have jurisdiction over state officials for actions taken in their official capacities--is directly at odds with 'history and experience, and the established order of things," *id.*, which define state immunity. Only this Court may determine whether the Ninth Circuit's view is the correct one.

This Court has dealt over the years with the issue of states' susceptibility to suit in different circumstances. The law has developed along several branches.

Suit against states qua states in federal courts has been addressed in a continually developing line of decision, beginning with the vintage opinions in *Chisholm v. Georgia*, 2 Dall. 419 (1792) and *Hans v. Louisiana*, 134 U.S. 1 (1890), through to such recent decisions as *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), to cite but a few.

To avoid the general bar against federal citizen suits naming states as defendants, the Court has developed a doctrine to permit suit against state officials when the officials allegedly act in violation of federal law. This branch of decision is well-known as the *Ex Parte Young* doctrine, after the decision in *Ex Parte Young*, 209 U.S. 123 (1908).

Yet another branch of decision, an apparent extension of the *Ex Parte Young* doctrine, *see Hafer v. Melo*, 502 U.S. 21, 30-31 (1991), recognizes federal court jurisdiction to hear damages claims against individually-named state officials who

allegedly violate individuals' civil rights. This doctrine, embodied in *Monroe v. Pape,* 365 U.S. 167 (1961), has been referred to as "the *Ex Parte Young* of retrospective relief." John C. Jeffries, Jr., "In Praise of the Eleventh Amendment and Section 1983," 84 Virginia L. Rev. 47, 59 (1998).

Finally, suit against a state in another state's courts was addressed in *Nevada v. Hall*, 440 U.S. 410 (1979), and suit against states in state courts, pursuant to Congressional mandate, was reached recently in *Alden v. Maine*, 527 U.S. 706 (1999).

Thus in all instances in which the sovereignty of states has been interposed to defeat a court's claim of jurisdiction, this Court has taken up the issue.

This case presents yet another challenge to states' sovereignty, this time in a tribe's courts. The Court again should accept and hear the case, even if the issue presented is daunting. *Cf. Ex Parte Young,* 209 U.S. at 143.

The conundrum in the instant matter is whether the immunity of a state, within its own legal borders, is susceptible to breach by the courts of another sovereign, whose role--if there is one--in "our federalism," *Alden v. Maine*, 527 U.S. 706, 748 (1999), is extra-constitutional. The Ninth Circuit in this matter answered this question in the affirmative. Respondents will add that the effect of immunity awaits decision at trial, but nonetheless it is clear the Circuit has expressly ruled the state's immunity does not bear upon the issue of jurisdiction. This aspect of the decision requires examination.

The State has maintained throughout that its officials may not, in any capacity, under any circumstances, be called to answer in a tribal forum. This assertion is based upon the historical understanding of state immunity. "The contours of sovereign immunity are determined by the founders' understanding. . . ." *Alden v. Maine*, 527 U.S. at 734. It is simply not within the contemplation of the framers of the

constitution, who devised "our federalism," that such would be so.

"It is incontestible that the Constitution established a system of 'dual sovereignty.'" *Printz v. U.S.*, 521 U.S. 898, 918 (1997), *quoting from Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Circuit's decision deeply wounds "our federalism" by giving over to a third tier of sovereigns the adjudicative power to reach state officials. The decision redefines the dual sovereignty of constitutional federalism into a tripartite system, which has no textual basis in the Constitution.

The State does not quarrel with the wisdom of modern federal policies towards tribes, which have driven the expansion of tribal courts' authority. Instead it maintains that those policies cannot influence the definition of tribal court jurisdiction, if the result permits tribes to pierce the historical immunity of states and their officials.

In *Seminole Tribe of Fla. v. Florida,* 517 U.S. at 54, this Court stated that, "For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States'" (*quoting from Hans v. Louisiana,* 134 U.S. 1, 15 (1890). It was no more contemplated by the founders, the State would maintain, that tribal jurisdiction would exist over unconsenting States or their officials.

Not only was it uncontemplated, but uncontemplatable. The possibility of tribal jurisdiction over state officials, in the historical context, which is necessarily referenced to construe the states' immunity, is self-evidently implausible. There historically were no tribal courts. "Tribal courts in the Anglo-American mold were virtually unknown in 1789," *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). "[M]ost Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.' H.R.Rep. No. 474, 23d Cong.,

1st Sess., 18 (1834)." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Slowly tribal courts developed only in the twentieth century, as an outgrowth of the federal statutory scheme. *See generally Duro v. Reina*, 495 U.S. 676 (1990).

It is thus a certainty that the notion of state immunity never comprehended within it an exception for tribal court actions. The invention of such exception by the Ninth Circuit in this case deserves careful review, which the State respectfully submits may suitably be done at this time, by this Court. As the Court has been quick to review and condemn congressional acts which would "compromise the structural framework of dual sovereignty," *Printz*, 521 U.S. at 932, it should be equally quick to act when subordinate federal courts similarly compromise that framework, as was done in this case by the district and appellate courts.

2. Individual capacity and individual defenses.

The Ninth Circuit held that the state officials' assertions of qualified immunity were also not jurisdictional. "The law is clear that qualified immunity, rather than serving as a jurisdictional bar, 'is an affirmative defense that must be pleaded by a defendant official.'" 196 F.3d at 1031 (App. at A-14) (citation omitted). But this presumes, without authority, that individual capacity lawsuits operate against state officials in tribal court in the same manner as in federal court. The Circuit's conclusion that state officials' qualified immunity is not jurisdictional crosses a significant threshold in federal law, which the Supreme Court should scrutinize.

The State suggests that individual immunity of state officials is qualified in tribal courts, if at all, in a very different sense than it is in federal court. This suggestion is based upon the unique evolution of the qualified immunity in federal court.

It has taken more than a century to develop the principle that individual-capacity suits against state officials in federal court is not suit against a state. Inability to enforce the

federal civil rights law drove the necessity for its development. Until qualified immunity was articulated and refined as doctrine, the law now codified at 42 U.S.C. § 1983 was "remarkable for its insignificance." Peter W. Low and John C. Jeffries, Jr., *Civil Rights Actions: § 1983 and Related Statutes II*, n.1 (2d ed. 1994). The decision in *Wyatt v. Cole*, 504 U.S. 158 (1992) expressly traces development of qualified immunity in conjunction with development of § 1983 jurisprudence in federal court.

Thus qualified immunity was a necessary artifice. It is contrary to the reality that "generally, a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment. . . . In the generality of cases, constitutional tort actions against government officers are functional substitutes for direct access to government treasuries." Jeffries, *supra*, 84 Virginia L. Rev. at 50.

Because as a practical matter it trenches closely on states' sovereignty, qualified immunity should be confined to operation in federal courts, to serve its original purposes in connection with § 1983. From the legislative history of §1983, "[i]t is clear that one reason the legislation was passed was to afford a federal right in federal courts. . . ." *Monroe v. Pape*, 365 U.S. 167, 180 (1961). It is *not*, however, abundantly clear that the purpose of § 1983 was to afford a federal right in *tribal* courts.

In fact it is quite clear that Congress never intended § 1983 to operate in tribal courts. While the legislative history of § 1983 establishes that state courts might also enforce its provisions, *Patsy v. Florida Board of Regents*, 457 U.S. 496, 506 (1982) ("many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system"), there is no equivalent history to demonstrate that tribal courts were intended enforcers. Silence in the congressional debates about tribal court's authority under the measure can only signify absence of such intent. *Cf. Alden v. Maine*, 527 U.S. at

741 (silence in the legislative history for Eleventh Amendment on the subject of citizen suits against states in state courts "suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution").

Sovereign immunity "strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Id.* at 757. Qualified immunity is part of this jurisprudence, and the Ninth Circuit in this case has deposited the delicate equilibrium of qualified immunity into the wholly dissimilar landscape of state-tribal relations. The State asserts that qualified immunity could and should be given a jurisdictional import instead, in the same manner as have individual immunity defenses of tribal officials in state and federal courts. *See e.g. Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (Ninth Circuit affirming dismissal of individually named tribal members in Title VII and § 1983 action, holding that "tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority"), *Miller v. Coyhis*, 877 F. Supp. 1262 (E.D. Wis. 1995), *Suarez v. Newquist*, 855 P.2d 1200, 1203 (Wash. App. 1993), *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), *Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334, 336 (W.D. Mich. 1994). On this topic, *see generally* Timothy W. Joranko, *Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity from Damages in Federal Court*, 26 Ariz. St. L. J. 987, 1009-1017 (1994). Analogously, if state officials are acting as officials when acts complained of occur, the tribal court should have no jurisdiction over them.

Even if the Ninth Circuit is correct in holding that individual immunity is not jurisdictional, review of the correctness of its treatment in this case remains essential. The qualified immunity enjoyed by an official in federal court is immunity from suit, and it is lost if not decided at the earliest

stages of litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). In this case, as the Ninth Circuit would have it, the officials' ardent assertion of the defense stirred no response from the tribal court or the tribal court plaintiff. The Ninth Circuit would tender the entire matter back to the tribal court. This result now requires additional exhaustion after nine years of litigation. This renders the immunity, if not worthless, at least a very pale protection.

The question poised in this context is how much solicitude will the exhaustion doctrine create for tribal courts and tribal court plaintiffs. The consequence for a plaintiff in federal court who does not meet a challenge based upon a qualified immunity defense is dismissal of the action. *See e.g. Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991), *Scott v. Clay County*, 205 F.3d 867, 874 (6th Cir. 2000), *Erwin v. Daley*, 92 F.3d 521, 525 (7th Cir. 1996), *Dixon v. Richer*, 922 F.2d 1456, 1460 (10th Cir. 1991), *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992), *Bailey v. Board of Cty, Commrs. of Alachua Cty.*, 956 F.2d 1112, 1123 (11th Cir. 1992). Yet here—using the most clear-cut example—the Circuit Court refuses to dispose of a case against the head of Nevada's wildlife agency, even when all federal judges seem to concur that no claim, nor even a single allegation, is made against him. *See* 196 F.3d at 1031, 944 F. Supp. at 1469.

The Ninth Circuit's suggestion that qualified immunity was not broached in the tribal court ("we have never required a party to anticipate another party's qualified immunity defense before the question of subject matter jurisdiction had been decided," 196 F.3d at 1031) is flatly contradicted by the record. Anticipation was unnecessary, because the issue was expressly addressed and argued, *see* App. at J-5 to J-6 (Motion to Quash), and at K-8 to K-13, and it was decided, App. at L-1 and C-4 to C-7.

Finally, but not least, the Circuit's undifferentiated treatment of tort claims and constitutional tort claims alike under the qualified immunity doctrine makes an immense

expansion of the doctrine. The State has steadfastly maintained that an individual capacity lawsuit for common law tort claims is inconsistent with a pleading alleging officer actions taken under color of state law. Even if the matter is allowed to go forward in tribal court on the constitutional tort claims, it ought not go forward on the simple tort claims. The State acknowledges development of law to the contrary in the Ninth Circuit, *see Ashker v. California Dept. of Corrections*, 112 F.3d 392 (9th Cir. 1997) (plaintiff may sue state officials in federal court for tort when they are named in their individual capacities), but it submits that this line of reasoning relies on an improper application of the holding in *Hafer v. Melo*, 502 U.S. 21, which only addressed constitutional tort claims. Seemingly, the Ninth Circuit's view of state immunity is that it may be pierced by the simple expedient of proper captioning.

The effect of state officials' qualified immunity in tribal court is vitally important to the State. In all truth, its officers and employees will be loathe to enter into relations with tribes if they know they will be subjected to personal exposure in tribal courts. This effect, and all the attendant federalism concerns, should be carefully considered before deciding finally that individual immunity is not a bar to jurisdiction of tribal courts. The State therefore respectfully submits that involvement by this Court is fully warranted to reevaluate the Ninth Circuit's treatment of the issue.

B. THE SUPREME COURT SHOULD EXAMINE THE NINTH CIRCUIT'S EXPANSIVE DEFINITION OF TRIBAL SOVEREIGNTY AND ADJUDICATIVE JURISDICTION.

This matter is properly reviewed by this Court for the additional reason that it involves a substantial redefinition of tribal sovereignty. In absence of congressional action, this Court possesses ultimate authority to define tribal sovereignty, and thus tribal adjudicative jurisdiction. It is clearly not within the states' power to affect this law. It is, foremost, the United States Supreme Court which "has frequently been

required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

Thus this Court has directly supervised the development of tribal courts into the modern age. In their early development, tribes and their courts had authority:

> to make their own substantive law in internal matters, see *Roff v. Burney, 168 U.S. 218 (1897)* (membership); *Jones v. Meehan, 175 U.S. 1, 29 (1899)* (inheritance rules); *United States v. Quiver, 241 U.S. 602 (1916)* (domestic relations), and to enforce that law in their own forums, see, *e. g., Williams v. Lee, 358 U.S. 217 (1959).*

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1977). To the same effect, *see Montana v. United States,* 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . ").

In their nascent form, tribal courts thus served as a shield for tribes against outside influences. "The Court has been careful to protect the tribes from interference with tribal control over their own members." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 170 (1982) (Justice Stevens dissenting). The shield has, however, been gradually transformed into a sword. From truly internal matters such as "membership," "inheritance rules," and "domestic relations," the tribal fora have burgeoned into other subject areas, acquiring virtually plenary authority, and assuming jurisdiction coextensive with the general governmental powers which states possess.

In the course of this evolutionary development, this Court has also frequently been called upon as referee, to define the limits of tribal jurisdiction, and to stay the sword of tribal jurisdiction. *See e.g. El Paso Natural Gas Co. v. Neztsosie,*

526 U.S. 473 (1999), *Strate v. A-1 Contractors,* 520 U.S. 438 (1997), *Burlington Northern Railroad Co. v. Estate of Red Wolf,* 522 U.S. 801 (1997), *Duro v. Reina*, 495 U.S. 676 (1990), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

So it is now fitting and consistent with past practice that the Court opine upon this pioneering pronouncement by the Ninth Circuit, that a tribal court may exercise jurisdiction over state officials.

As an initial matter, this Court should review the interesting but arbitrary line drawn by the Ninth Circuit to explain its inconsistent result in *County of Lewis v. Allen,* 163 F.3d 509 (9th Cir. 1998) (en banc). In both cases, the tribe expressly authorized the presence of non-member peace officers. The Circuit pronounced in *County of Lewis v. Allen* that tribal consent by written agreement to non-tribal peace officer presence deprives the tribal court of jurisdiction, 163 F.3d at 515, but in the present matter held that a tribal judge's consent to the same by signing a search warrant does not. 196 F.3d at 1027-1028 (App. at A-10 to A-11).

The Court should also review the Ninth Circuit's creation of a bright-line test to replace the well-known formula for determining tribal jurisdiction. That formula requires careful examination of "tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. at 855-856.

In this case, the lower courts have departed from the formula. The Ninth Circuit has indulged the tribal court with a bright-line rule based on territorial control, rather than perform the necessary, careful inquiry. The Circuit professes to find authority for abandonment of the more inquiring analysis,

relying on the decision in *Strate v. A-1 Contractors,* 520 U.S. 438 (1997). 196 F.3d at 1025-1027 (App. at A-7 to A-8).

It is the State's simple contention that *Strate* provides no basis to establish a bright-line proxy for the *Nat'l Farmers Union* formula. Rather, as the State has always argued, that formula still applies. Under it, proper analysis would include examination of the extent to which tribal sovereignty has been necessarily divested, and would disclose that one of the necessarily divested tribal powers, *see United States v. Wheeler*, 435 U.S. 313, 323 (1978), is the power to call state officials to answer in tribal courts.

This limitation may be deduced from various lines of Supreme Court decision. One is that which confirms the nature and vigor of state sovereignty and immunity as a constitutional precept, as described in the earlier sections. Another is that line of cases describing tribes as limited sovereigns, *United States v. Wheeler*, 435 U.S. 313, 323 (1978), whose sovereignty—unlike that of the states—is subject to defeasance. *Compare, e.g., Escondido Mut. Water Co. v. La Jolla Band of Mission Indians,* 466 U.S. 765, 787 n.30 (1984) and *New York v. United States*, 505 U.S. 144, 183(1992) (even with state consent, Congress may not enlarge its powers under the constitution vis-à-vis the state).

Yet another path exists to arrive at the necessary conclusion that tribal courts are divested of jurisdiction over state officials. It is the one embarked upon already by this Court in its previous decisions in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), *Seminole Tribe of Fla. v. Florida,* 116 S. Ct. 1114 (1996), and *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997). The Court's general paradigm in these decisions bespeaks a clear barrier to tribal authority over states and their officials. The *Idaho* decision even ventured into tribes' authority over officials under the doctrine of *Ex Parte Young.*

The instant case represents yet one more increment in the development of federal law which, so far, this Court has deemed significant enough to address, and should address here to conclude the analysis.

C. THE CIRCUIT HAS MISAPPLIED THE TRIBAL EXHAUSTION RULE BY SEPARATING THE QUESTIONS OF TRIBAL COURT JURISDICTION AND STATE IMMUNITY.

1. Immunity Defenses Are Factors Relevant to the Jurisdictional Determination.

A related procedural issue exists in this matter, created by the Circuit's order of analysis. Though procedural, the issue is manifestly significant. It defines for the first time a protracted procedure for federal court review of actions by state officials challenging tribal jurisdiction. This new procedure deserves this Court's considered attention.

The lower courts bifurcated the analysis in this case, treating separately the issues of tribal court jurisdiction and state immunity. Factually, the Circuit's conclusion that the tribal court only ruled upon its own jurisdiction, and not the immunity questions, is an invention without any record support.[4] More importantly, it is a legal invention contrary to

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[4] The Ninth Circuit did not acknowledge the tribal appellate court's express jurisdictional holding:

> We conclude not only the [sic] Hicks effected a valid form of private service of process upon the State Defendants, but because of three reasons the State Defendants are properly before the Fallon Tribal Court for suit. First, the State defendants acts of repeated voluntary entry onto the Fallon Indian Reservation and the Plaintiff's allotted Indian lands; Second, State Defendants [sic] repeatedly availing themselves, voluntarily, of the jurisdiction of the Fallon Tribal court that State Defendants [sic]; and, Third, the declaration of tribal law that the act of entry upon the Fallon Indian Reservation and Colony "shall conclusively de [sic] deemed consent to the jurisdiction" of the Fallon Tribal Court. We therefore remand to the Fallon Tribal Court to immediately set a trial date and

this Court's precedents, which indicate that immunity in part defines jurisdiction.

The Circuit reasoned that assertions of immunity, made by the state and its officials from the inception of this litigation, had not been ruled upon by the tribal court, 196 F.3d at 1029 (App. at A-13). Therefore, the Circuit concluded, the federal court should not decide the issue of sovereign immunity's effect on tribal court jurisdiction.

To support its conclusion, the Circuit wrote:

> Sovereign immunity has been treated by this court as an affirmative defense, "whatever its jurisdictional attributes." *ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289, 1291 (9th Cir. 1993)*. Thus, the defense is subject to our tribal court exhaustion rule, even though the issues the defense presents are jurisdictional in nature. Indeed, this court has held that "Eleventh Amendment immunity . . . does not implicate a federal court's jurisdiction in any ordinary sense." *Id.* Instead, this kind of immunity is raised and argued by the party seeking its benefit. Such arguments should be heard and decided in the first instance by the Tribal court.

Decision at 1029, n.12 (App. at A-23).

Appropriately in this reference, the Ninth Circuit accepted the treatment of a state Eleventh Amendment defense in federal court as a relevant analogy, but then failed to identify the proper treatment. It cited its decision in *ITSI TV Productions, Inc. v. Agricultural Associations,* which in turn depended upon this Court's holding in *Patsy v. Florida Board of Regents*, 457 U.S. 496, 515 n.19 (1982), that it has "never held that [the defense] is jurisdictional in the sense that it must be raised and decided by [the court] on its own motion." *Id.*

> allow the Plaintiff's civil jury trials to be heard without further delay consistent with this opinion.

App. at C-4 to C-5.

However, the decision omits any reference to this Court's subsequent opinion in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), which established the opposite rule. *See* F. Ryan Keith, *Must Courts Raise the Eleventh Amendment Sua Sponte?: The Jurisdictional Difficulty of State Sovereign Immunity,* 56 Wash. & Lee L. Rev. 1037, 1050 (1999) (quoting from *Pennhurst*, 465 U.S. at 119-20, that "the purpose of the Eleventh Amendment is to 'deprive[ ] a federal court of power to decide certain claims against States that would otherwise be within the scope of art[icle] III's grant of jurisdiction'").

The Circuit's reliance on *Patsy* instead of the *Pennhurst* model appears seriously misguided when viewed in context with this Court's recent pronouncements. In *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44 (1996), the state challenged federal court jurisdiction by invoking the Eleventh Amendment, and the issues were decided together as one and the same, part and parcel, and not divided for sequential treatment. When sued by the Seminole Tribe, the state of Florida "moved to dismiss the complaint, arguing that the suit violated the State's sovereign immunity from suit in federal court." 517 U.S. at 52. The district court denied the motion, but on interlocutory appeal, the circuit court–whose decision was affirmed by the Supreme Court–"disagreed with the District Court . . . that the Indian Commerce Clause grants Congress the power to abrogate a State's Eleventh Amendment immunity from suit, and *concluded therefore that it had no jurisdiction* over petitioner's suit against Florida" (emphasis added). 517 U.S. at 52-53.

In affirming the Eleventh Circuit's decision, this Court in *Seminole Tribe* explained that "[i]t was well established in 1989 . . . that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III." 517 U.S. at 64.

The same procedure—referring to immunity in order to determine jurisdiction—appears in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 691 (1999) ("we hold that the *federal courts are without jurisdiction* to entertain this suit against an arm of the State of Florida") (emphasis added); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 638-639 (2000) (affirming dismissal of three actions, including one in which a state litigant had "moved to dismiss the suit for lack of subject matter jurisdiction, contending it was barred by the Eleventh Amendment"); and *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) ("Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power . . . ."). *See also Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 633 (1999) ("Florida Prepaid moved to dismiss the action on the grounds of sovereign immunity," and the action was dismissed); *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 265 (1997) (in action against state as well as its individually-named officials, "defendants moved to dismiss the Tribe's complaint on Eleventh Amendment immunity grounds," and the action was dismissed).

Claims of sovereign immunity are also considered jurisdictional when raised by tribal officials. *See e.g. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit"). *See also Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416, 417-418 (9th Cir. 1989) (suit against tribe dismissed when "Band filed a motion to dismiss for lack of personal and subject matter jurisdiction and failure to state a claim, " and Circuit held that "the issue of tribal sovereign immunity is jurisdictional in nature"), *Marx v. Government of Guam*, 866 F.2d 294, 301 (9th Cir. 1989) (finding that Guam had sovereign immunity, Court concluded "the entire case should be dismissed for lack of jurisdiction"),

McClendon v. United States, 885 F.2d 627, 629 (9th Cir. 1989) ("issue of tribal sovereign immunity is jurisdictional in nature"), and *Arizona Public Service Co. v. Aspaas*, 69 F.3d 1026, 1032 (9th Cir. 1995) (citing *Chemehuevi Indian Tribe v. California St. Bd. of Equalization, 757 F.2d 1047, 1051* (9th Cir.), *rev'd in part on other grounds, 474 U.S. 9 (1985)*, for proposition that tribal sovereign immunity is jurisdictional in nature).

Besides being inconsistent with its own decisions addressing sovereign immunity, the Ninth Circuit's decision in this matter also conflicts with the law of other circuits. In *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000), when considering a tribe's assertion of immunity late in the proceedings, the Eighth Circuit held that sovereign immunity is a jurisdictional question, and is not an affirmative defense that, if not raised, is waived.

The Ninth Circuit's holding also sounds similar to the argument rejected in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.*, 506 U.S. 139 (1993) that "the Eleventh Amendment does not confer immunity from suit, but merely a defense to liability." This argument, the Court said,

> misunderstands the role of the Amendment in our system of federalism: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers, 123 U.S. 443, 505, 31 L. Ed. 216, 8 S. Ct. 164 (1887).*

506 U.S. at 146.

Notably, when tribal officials are sued, federal courts even address tribal and individual defenses together to determine their jurisdiction. *See e.g. Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991), *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476,

479-480 (9th Cir. 1985), *Cameron v. Bay Mills Indian Community*, 843 F. Supp 334, 336 (W.D. Mich. 1994).

Thus the Ninth Circuit has established an exhaustion rule without parallel for Nevada and its officials, in requiring a two-step, sequential consideration of tribal court jurisdiction and state immunity claims. Such unbalanced treatment deserves a careful reexamination by this Court.

2. The Circuit's Newly-Created Exhaustion Requirement for Immunity Conflicts With the Law of Another Circuit.

Even assuming, for argument's sake, that the Ninth Circuit correctly concluded the tribal court did not rule–and did not need to rule–on the issue of immunity, it is mistaken in its conclusion that tribal exhaustion is required now on the question of immunity. On this point, a recent decision of the First Circuit is at almost direct odds.[5]

The exhaustion requirement permits a tribal court to "determine, in the first instance, the scope of its own jurisdiction . . . ." *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 29 n.5 (1st Cir. 2000). This is the rule established in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

The First Circuit ruled, however, that immunity questions implicate different interests than the issue of jurisdiction, and those interests do not recommend exhaustion of immunity questions in tribal court. "[T]he issue of whether a suit may be brought against a tribe at all, in any forum, is of equal interest to the federal and tribal courts." *Ninigret*, 207 F.3d at 29 n.5. Since tribal immunity is not a peculiarly tribal concern, it is not left to the tribal court to decide. *Id.*

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[5] The only difference in circumstances is that the First Circuit considered the need to exhaust the immunity issue when asserted by a tribe, not a state.

Even more so, the immunity of state officials in tribal courts cannot be described as a peculiarly tribal concern. Therefore, even if jurisdiction and immunity are two different concepts, once jurisdiction has been determined, it should not be necessary to submit to further exhaustive tribal court analysis on immunity issues before a federal court will declare the relevant law.

This Court, respectfully, should reconcile these disparate approaches to immunity issues within the tribal court exhaustion doctrine, and further elucidate the doctrine as a refinement of the principles first enunciated by this Court in *National Farmers Union* and *Iowa Mutual*.

II. THE NINTH CIRCUIT COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT ON THE EFFECT TO BE GIVEN THE RULE IN *MONTANA v. U.S.*, 450 U.S. 544 (1981).

This case presents the Supreme Court its first clear opportunity to explain whether the rule of *Montana v. U.S.*, 450 U.S. 544 (1981), applies when a cause of action arises on land controlled by a tribe.

In *Montana*, this Court set out a model for determining when tribal civil jurisdiction exists over nonmembers within a reservation. *Montana* created a presumption against tribal jurisdiction, with two exceptions based upon (1) consent of the nonmember to tribal jurisdiction, and (2) "conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The facts in *Montana,* however, involved regulation of nonmember activities occurring on non-tribal land within a reservation. These circumstances have become the pivotal focus in a battle between proponents and opponents of a broad reading of *Montana*.

The opponents of the broad reading, and the Ninth Circuit, rest upon the decision in *Williams v. Lee,* 358 U.S.

217 (1959) for their position that, on tribally controlled land, a presumption exists in favor of tribal jurisdiction over nonmembers.[6]

Thus this dialectic has crystallized into a conflict between two competing lines of authority from this Court, *Montana* versus *Williams v. Lee*. Not surprisingly, proponents and opponents profess to see affirmation of their respective positions in the Court's recent pronouncements. The Ninth Circuit in the instant matter discovered--based upon *Strate*, 520 U.S. 438, and *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999)--an "evolving Supreme Court precedent that stresses membership and rights of land ownership as sources of tribal power," 196 F.3d at 1026 (App. at A-8). Based upon this "evolving precedent," it concluded the "*Montana* presumption against tribal court jurisdiction does not apply in this case." *Id.* at 1028 (App. at A-11). "Once a tribe's authority to regulate activities on its land has been demonstrated, civil jurisdiction regarding those activities follows." *Id.* at 1029 (App. at A-12).

The Ninth Circuit's conclusion is contrary to the holdings from two other circuit courts. The Eighth Circuit, in *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996), *affirmed*, 520 U.S. 438, reasoned to the opposite conclusion about *Montana's* application. It determined that *Montana's* analytical framework was applicable to determine tribal court jurisdiction whenever a cause of action arose on tribal lands. It recited numerous subsequent pronouncement by this Court to support its conclusion, and ended with a quote from *South Dakota v. Bourland*, 508 U.S. 679 (1993), that "after Montana, tribal sovereignty over nonmembers 'cannot survive without

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[6] The State would distinguish *Williams v. Lee* from the facts of this case by (1) the absence of state officials as defendants, and (2) the presence of a tribal member as defendant, whose protection from possible bias in state court could well have been the basis for the decision.

express congressional delegation.'" 76 F.3d at 935 (citation omitted).

The Tenth Circuit has expressly rejected territorial ownership as the litmus test for jurisdiction, in *Atkinson Trading Co, Inc. v. Shirley*, No. 98-2247, 2000 U.S. Appeal LEXIS 8609 (10th Cir. 2000). Ironically, the Tenth Circuit addressed the issue in order to extend tribal jurisdiction onto non-tribal lands. The Navajo Nation asserted authority to tax non-member guests of a non-member business establishment "held in fee simple, but completely surrounded by Navajo Nation Reservation trust lands." *Id.* at *1. The Navajo Nation urged analysis of its jurisdiction based upon the decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The *Merrion* Court analyzed tribal jurisdiction by reference to whether the nonmember had accepted the privilege of carrying on business on the reservation and benefited from the provision of tribal governmental services. 455 U.S. at 137-138.

Review in *Merrion* involved tribal, not fee lands. 455 U.S. at 135. Nonetheless, the Tenth Circuit in *Atkinson* applied the *Merrion* analysis to the non-tribal land case before it. After scrutinizing the cases, it rejected the view that "*Montana, Brendale, South Dakota v. Bourland*, 508 U.S. 679 (1993), *Strate*, and *Merrion* should be read to establish one rule for assertions of tribal jurisdiction on fee land (*Montana*, et al.) and another rule for tribal land (*Merrion*)." 2000 U.S. Appeal LEXIS at *25. It concluded, directly contrary to the Ninth Circuit, that "Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor of the *Montana* standard . . . ." *Id.* at *42.

Thus the Ninth Circuit is in direct conflict with both the Eighth and the Tenth Circuit. In order to limit future litigation, and for the benefit and guidance of all who deal with tribes, it behooves this Court to clarify the significance of the *Montana* rule, and conform the law among the circuits on this important point.

CONCLUSION

This petition presents legal issues that are of the first order of significance. The Ninth Circuit has unequivocally held that a tribal court has jurisdiction over civil actions naming state officials. This radically redefines the relationship between tribes and states. In doing so, it also redefines state and tribal sovereignty, cutting to core principles of federal law.

The appeals court has also redefined the legal analysis used for determining jurisdiction of tribal courts over nonmembers, and in the process creates a conflict among the circuits on this important subject.

Finally, the Ninth Circuit has made new law on the subject of tribal exhaustion, requiring an inordinately prolonged process whenever immunity is present as an issue.

Beyond its purely legal and academic importance, the decision of the Ninth Circuit will constrict the constructive interplay between tribes and states. For Nevada at least, a state with twenty-six tribes and in which tribal-state relations have been remarkably amicable, this means cooperative endeavors will become more difficult in areas such as law enforcement, fire protection, transportation, education, and environmental protection, to name but a few. Concern for these real consequences, as much as the more esoteric legal disputes, animate this petition. It should likewise bear on this Court's decision whether to entertain the petition.

Review by this Court at this point in the litigation is critical. Review of questions of law concerning tribal court jurisdiction is *de novo*. Later review challenging tribal court findings on immunity defenses, after jurisdiction is already established, will be much more deferential and limited. *Cf. FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). Respectfully, therefore, the State's petition should be granted now in order for this Court to exercise its full authority on these vital questions of federal law.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

State of Nevada; William Molini; Nevada Division of Wildlife; Michael C. Spencer, Rich Ellington, and Bill Fitzmorris,
Plaintiffs-Appellants,

v.

Floyd Hicks; Tribal Court in and for the Paiute-Shoshone Tribes; Honorable Joseph Van Walraven,
Defendants-Appellees.

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No. 96-17315

D.C. No. CV-94-00351-DWH

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
David W. Hagen, District Judge, Presiding

Argued October 7, 1997

Submitted November 4, 1999
San Francisco, California

Filed November 9, 1999
Amended January 24, 2000

Before: Alfred T. Goodwin, Betty B. Fletcher and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge B. Fletcher;
Dissent by Judge Rymer

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs appealed from an order of the United States District Court for the District of Nevada which, denied them summary judgment and granted summary judgment to defendants Native American and tribal court on their claims against state officials for tribal common law torts and federal and tribal civil rights violations.

OVERVIEW: Plaintiffs, the State of Nevada and named state officials, appealed a district court decision denying them summary judgment and granting summary judgment to defendants Native American and tribal court on their claims against state officials for tribal common law torts and federal and tribal civil rights violations. The court of appeals affirmed summary judgment against plaintiffs. The court found that the tribal court had subject matter jurisdiction over the claims brought by Native American defendant against the state officials and held that the issue of qualified immunity was not exhausted before the tribal court and therefore was not properly before the district court. The court concluded the district court similarly should have refrained from addressing sovereign immunity, leaving the issue to the tribal court in the first instance. Accordingly, the court affirmed the district court's determination that the tribal court has jurisdiction over the actions underlying the instant case.

OUTCOME: Judgment affirmed granting summary judgment to defendants, Native American and tribal court, where tribal court had subject matter jurisdiction over claims brought by Native American defendant and the issue of plaintiffs' qualified immunity was not properly before the district court.

COUNSEL:

C. Wayne Howle, Deputy Attorney General, Carson City, Nevada, for the plaintiffs-appellants.

Melody L. McCoy, Native American Rights Fund, Boulder, Colorado, for the defendants-appellees.

Mitchell Wright, Reno, Nevada, for defendant-appellee Floyd Hicks.

OPINION:

AMENDED OPINION

B. FLETCHER, Circuit Judge:

This case concerns the jurisdiction of a tribal court over claims against state officials for tribal common law torts and federal and tribal civil rights violations. The events giving rise to these claims took place on Indian-owned land on a reservation.

The State of Nevada and named state officials appeal the decision of the district court denying them summary judgment and granting summary judgment to Floyd Hicks and the tribal court. The district court held that the tribal court had jurisdiction to hear the suit brought by Hicks against state officials for tribal common law torts and federal and tribal civil rights violations occurring on Indian-owned land. It also held that the tribal court action against the state officials in their individual capacities was not barred by sovereign immunity. It declined to review on the merits the officials' claims of qualified immunity from suit because they had not been exhausted before the tribal court. We affirm the district court's holding that the tribal court has jurisdiction, and we affirm its holding that the issue of qualified immunity was not exhausted before the tribal court and therefore was not properly before the district court or this court. We conclude the district court similarly should have refrained from addressing sovereign immunity, leaving the issue to the tribal court in the first instance.

I.

Floyd Hicks is an enrolled member of the Fallon Paiute-Shoshone Tribe ("Tribe"), a federally recognized Indian tribe with over 900 members. The Tribe's reservation in western Nevada consists of about 8,000 acres of land held by the federal government in trust for the Tribe and for individual tribal members. Hicks lives within the Tribe's reservation on allotted land held by the government in trust for him.

On August 30, 1990, Michael Spencer, a Nevada state game warden, obtained a search warrant from the New River Justice Court to search Hicks' property for evidence of the possession or killing of a big horn sheep of the California subspecies, a gross misdemeanor under Nev. Rev. Stat. § 501.376. The warrant

provided, however, that the state court lacked jurisdiction over the Fallon Paiute-Shoshone reservation and that the warrant was valid only if approved by the Fallon Tribal Court.

That same day, a tribal judge approved the warrant but limited the search to the "exterior premises and any vehicles thereon." Spencer, accompanied by a tribal police officer, allegedly executed the warrant and removed at least one mounted big horn sheep head trophy from Hicks' residence. However, the trophy was apparently of the Rocky Mountain subspecies, and it was later returned to Hicks. Hicks asserts that the trophy was damaged when returned.

On June 12, 1991, Spencer applied for and received another state search warrant to seek evidence for the same state offense. Spencer, along with state game wardens Rich Ellington and Bill Fitzmorris, executed the warrant that same day, again accompanied by tribal police and with tribal court approval. One or more big horn sheep head trophies belonging to Hicks were removed from Hicks' residence. Once again, it was ultimately determined that the trophies were not evidence of any state crime or game violation and they were returned to Hicks.

Hicks filed two complaints in Fallon Tribal Court for money damages alleging damages resulting from the actions of the state and tribal officials on August 30, 1990, and June 12, 1991. The complaints named William Molini, Director of the Nevada Department of Wildlife, Michael Spencer, Rick [sic] Ellington, and Bill Fitzmorris as defendants in both their official and individual capacities, and alleged a variety of claims under the Indian Civil Rights Act ("ICRA"), *25 U.S.C. § 1302,* as well as tort claims under tribal common law. By amended complaint, Hicks claimed violation of unspecified federal and tribal civil rights. n1

The tribal court held, in a written order, that it had jurisdiction over the actions. Following a challenge to Hicks' service of process by publication, the tribal court quashed the service as ineffective. Following cross-appeals, the Intertribal Appellate Court reversed and remanded for trial, upholding both the service of process and the jurisdiction of the tribal court. Two weeks later, the State of Nevada and the named state officials (hereinafter "Nevada") filed the present action in federal district court against Hicks, the tribal court and tribal judge (hereinafter "tribal appellees"), for declaratory relief regarding the issue of tribal court jurisdiction. n2

Before the district court, the parties presented cross-motions for summary judgment on whether the tribal court had jurisdiction over the claims against the state officials. Meanwhile, the tribal court granted Hicks' motions voluntarily to dismiss the claims against the state officials in their official capacity. The district court then held that the dismissal mooted the issue of tribal court jurisdiction over the state officials in their official capacities.

After oral argument and supplemental briefing, the district court issued an order denying Nevada's motion for summary judgment and granting the motion for summary judgment made by Hicks and the tribal appellees. In its order, the district court held that the Intertribal Court of Appeals did not err in holding that service of process was in accordance with tribal law. n3 The district court further held that the tribal court had subject matter jurisdiction over the claims brought by Hicks against the state officials in their individual capacities, and that the claims were not barred by sovereign immunity. Additionally, the district court held that two issues, the claims of qualified immunity by the state officials and whether any claims lie against William Molini, had not been exhausted in the tribal courts.

II.

As a threshold issue, the district court correctly held that it had federal question jurisdiction to determine whether the tribal court had jurisdiction. *See 28 U.S.C. § 1331; see also National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985).* We review determinations of federal law regarding the extent of tribal court jurisdiction de novo. *See FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313-14 (9th Cir. 1990), cert. denied, 499 U.S. 943, 113 L. Ed. 2d 459, 111 S. Ct. 1404 (1991).*

In determining the tribal court's jurisdiction, the district court first noted that no federal statutes provide guidance on the extent of tribal court jurisdiction over civil matters. The district court then adopted as basic guiding principles the distinction between civil and criminal jurisdiction, and the recognition by the courts of "a strong geographic component" distinguishing incidents occurring on Indian-owned land from those on non-Indian owned land. The district court also acknowledged the "general proposition" of *Montana v. United States, 450 U.S. 544, 565, 67 L. Ed. 2d 493, 101*

S. Ct. 1245 (1981), that on non-Indian owned land "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," n4 but doubted its applicability to the instant case after finding Hicks' allotment to be Indian-owned land.

The district court suggested instead that the applicable rule on the facts before it was that of *Williams v. Lee*: where the underlying incidents occur on Indian-owned land, tribal court jurisdiction is presumed unless affirmatively limited by an act of Congress. *See Williams v. Lee, 358 U.S. 217, 222, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)* ("This court has consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do it."). However, the district court expressed concern that the Supreme Court had not yet made clear the circumstances in which the *Montana* rule should be applied and assumed without deciding for the purposes of this case that it would apply. It ultimately concluded that, even were *Montana* to apply, the tribal court would still have jurisdiction because the underlying facts fell within the exceptions to *Montana*'s general presumption against jurisdiction.

Subsequent to the district court's decision, the Supreme Court decided *Strate v. A-1 Contractors, 520 U.S. 438 (1997)*. Nevada argues on appeal that *Strate* interprets *Montana* as precluding tribal court jurisdiction over civil actions involving non-Indians regardless of whether the underlying incidents occurred on Indian-owned land or non-Indian owned land. However, the *Strate* Court made no such determination, a fact we recently noted in *County of Lewis v. Allen, 163 F.3d 509, 514 (9th Cir. 1998)*.

We now affirm the district court's determination that the tribal court has jurisdiction over the actions underlying the instant case. We also affirm the district court's rulings on the issues of sovereign immunity and qualified immunity.

A.

The Court in *Strate* held that a tribal court lacked jurisdiction to hear civil tort claims against a non-Indian brought by the widow of a tribal member, and her five adult tribal member children, for injuries occurring on a public highway maintained by the State of North Dakota under a federally granted right-of-way over tribal reservation land. *520 U.S. at 442*. In *Strate*, the Court clarified its interpretation of *Montana*, which dealt with tribal regulation of

hunting and fishing in a state-owned river running through a reservation. *Strate* makes clear that the Court's holding in *Montana* is equally applicable to tribal court jurisdiction over incidents occurring on a highway running through a reservation over which the tribe had ceded all right to control access. However, the *Strate* Court carefully expressed "no view on the governing law or proper forum when an accident occurs on a *tribal* road within a reservation." *Id. at 442* (emphasis added).

The Court emphasized in *Strate* that the decision in *Montana* related to "reservation land acquired in fee simple by non-Indian owners." *Id. at 446.* By contrast, "the *Montana* Court recognized that the Crow Tribe retained power to limit or forbid hunting or fishing by non-members on land still owned by or held in trust for the Tribe." *Id.* The Court also reiterated that it "'can readily agree,' in accord with *Montana*, . . . that tribes retain considerable control over non-member conduct on tribal land." *Id.* (quoting *Montana, 450 U.S. at 557).* However, finding that the stretch of highway at issue was "aligned . . . for the purpose at hand, with land alienated to non-Indians," the Court in *Strate* opined that the "decision in *Montana* . . . governs this case," *520 U.S. at 456,* and further decided that neither of the two *Montana* exceptions applied to the facts in that case. n5

Again in *El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999),* the Court emphasized the significance of land-ownership to the jurisdictional inquiry. That case examined the extent of the doctrine requiring tribal court exhaustion for claims arising under the *Price Anderson Act. 119 S. Ct. at 1433.* Members of the Navajo Nation brought suit against mining companies for injuries arising from uranium mining and processing on the Navajo Nation Reservation by the defendants. *Id.* at 1434. The Court found for El Paso on the ground that the Price-Anderson Act preempted the injury claims, requiring that actions for liability for nuclear accidents be brought only in federal court. The Court, however, rejected the mining companies' argument that under *Strate*, a tribal court has jurisdiction over nonmembers only where the tribe has regulatory jurisdiction with respect to the matter at issue. *Id.* at 1436 n.4. The Court found petitioners' reliance on *Strate* was misplaced, because, in contrast to the claims in *Strate*,

which arose on a state highway, the events at issue in *El Paso* occurred on tribal lands. *Id.*

Our post-*Strate* opinions are consistent with evolving Supreme Court precedent that stresses membership and rights of land ownership as sources of tribal power. *See, e.g.*, William C. Canby, Jr., *American Indian Law* 72-78, 128-41 (1998); n6 Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision, 55 U.Pitt. L. Rev. 1 (1994).* In *Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), cert. denied, 523 U.S. 1074, 118 S. Ct. 1516, 140 L. Ed. 2d 669 (1998),* we held that a tribal court has no jurisdiction over a suit by a tribal member against a nonmember arising from an accident on a state highway that runs through the reservation. The facts of *Wilson* mirrored the facts of *Strate* almost precisely: the highway at issue in *Wilson* was a state highway constructed on a right of way granted pursuant to a federal statute with the consent of the Blackfeet Nation. *Id. at 813-14.* The general public had unrestricted access to the road, and no statute or treaty authorized the tribe to govern the conduct of nonmembers on the highway. *Id. at 814.*

In *County of Lewis v. Allen, 163 F.3d 509, 514 (9th Cir. 1998),* we looked to "the landowner's right to exclude" certain nonmembers from the reservation, rather than land ownership per se, as the source of tribal power. Central to that case is a law enforcement agreement between the Nez Perce Tribe and the State of Idaho that granted jurisdiction to the state to enforce misdemeanor laws. Acting under the authority of the agreement, a deputy county sheriff arrested a tribal member, Allen, on the reservation for disturbing the peace within the reservation. Allen brought suit in tribal court against the county and its law enforcement officers for torts arising out of the arrest. Allen's residence was on fee land not owned by the tribe or the federal government, but the record does not reflect whether the fee was owned by an Indian or non-Indian. *Id. at 512 n.1.* The court stated that, "from the standpoint of the exercise of adjudicative authority over nonmember county law enforcement officers, it does not matter how the land was owned because the consent to criminal jurisdiction was tantamount to alienation of the land to non-Indians

for the limited purpose [of patrolling the reservation, investigating minor crimes and making arrests]." *Id. at 514.*

We saw the Agreement as "a significant alienation of tribal sovereignty and control." *Id.* Our analogizing to *Strate* was explicit: "Like the tribes in *Strate*, which consented to and received payment for a highway easement, the Nez Perce Tribe ceded its 'gatekeeping right,' by consenting to and receiving the benefits of state law enforcement protection." *Id.* We found that the tribal court, having surrendered its exclusive criminal jurisdiction over Indians for minor criminal acts committed on the reservation, had surrendered its civil jurisdiction over the conduct of county officials acting pursuant to the Agreement. *Id.*

Finally, in *State of Montana v. King, 191 F.3d 1108, 1999 WL 694953 (9th Cir. 1999),* we held that an Indian tribe lacked authority to enforce its employment ordinance against a state for work done on a state owned right-of-way. Our decision in *King* is in line with the *Strate* rule: tribes lack authority to regulate, and thus power to adjudicate, activities on land alienated to non-Indians.

Unlike *Montana*, *Strate*, *Wilson*, *County of Lewis*, and *King*, the incidents underlying the instant case occurred on Indian-owned, Indian-controlled land, over which the Tribe retained its right to exclude non-members. n7 In the absence of federal statutes limiting it, the Tribe has exclusive criminal jurisdiction in Indian country over minor crimes committed by Indians. *See Ex parte Crow Dog, 109 U.S. 556, 27 L. Ed. 1030, 3 S. Ct. 396 (1883).* State officers have no jurisdiction over such crimes. Outside of Indian country, the state has general criminal jurisdiction over all persons, including Indians, *see, e.g., Hagen v. Utah, 510 U.S. 399, 127 L. Ed. 2d 252, 114 S. Ct. 958 (1994).* Within Indian country, however, the state's jurisdiction is generally limited to those crimes that do not concern Indians or Indian interests. *See id.* Before a state official can conduct a search and seizure on the reservation to investigate a state crime, a tribal search warrant must be issued by a judge of the tribal court. *See* Fallon Tribe Law & Order Code, Title 1 § 4-40-010, 4-40-030(a)); *see also United States v. Anderson, 857 F. Supp. 52 (D.S.D. 1994)* (holding that a state officer lacks power to search the reservation residence of an Indian parolee from state prison, even though the parolee consented to searches as a condition of parole).

In this case, as part of his investigation into a suspected violation of a state game law, Warden Spencer filed an affidavit of probable cause in the New River Township, County of Churchill on August 30, 1990. The state court issued a warrant that stated:

YOU ARE HEREBY ORDERED, SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES, to search the said premises . . . .

This Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes of the Fallon, Churchill County, Nevada.

The same application and approval procedure was followed on June 12, 1991. On both occasions, Spencer was accompanied by a tribal police officer when he executed the warrant at Hicks' residence.

Unlike the Agreement in *County of Lewis*, the warrant in this case bestows no broad grant of authority upon the State of Nevada. The Tribe retained sovereignty over the land upon which the search and seizure took place. The land on which Hicks' residence stood was neither open to the public, nor controlled or maintained by any entity other than the Tribe. When the tribal court agreed to grant the state warden's request for a warrant, it was exercising its "gatekeeping right." The tribal court was free to exclude state officials engaged in law enforcement activities on the reservation. The tribal court was the sole authority to which the state warden could apply - and to which it in fact had to apply - for permission to execute a search warrant on the reservation. n8 Further underscoring the exclusivity of tribal jurisdiction is the fact that the state warden was accompanied by a tribal officer upon the execution of each warrant.

Each authorization of the execution of the warrants marked an isolated incident wherein the tribal court granted a state official permission to enter the reservation as part of a state investigation into an alleged violation of state law. There was no cession of criminal law jurisdiction, or indeed of any law enforcement jurisdiction at all. Unlike in *County of Lewis*, no benefit was conferred on the Tribe. Law enforcement on the reservation remained in the hands of the Tribe. The tribal court merely granted

a state official's request to come onto the reservation for a limited, clearly delineated purpose under circumstances where all inherent jurisdictional authority lay with the Tribe. We emphasize that the tribal court modified the original search warrant by restricting the authorized search to "exterior premises only and to vehicles thereon," demonstrating that the Tribe retained authority to direct the state officers' activities on tribal land.

This case then, involves no "significant alienation of tribal sovereignty and control" over law enforcement or over Indian-owned land within the reservation. *See County of Lewis, 163 F.3d at 514. Cf. Strate, 520 U.S. at 442* (holding that the grant of the right-of-way to the state, which precluded the tribe from exercising proprietary rights of exclusion, rendered the highway the equivalent of non-Indian fee land); *Montana, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245* (holding that an Indian tribe had no authority to regulate hunting and fishing by non-Indians on non-Indian owned fee land within the reservation); *County of Lewis, 163 F.3d at 514* ("The consent [by the tribe] to criminal jurisdiction [of the state] was tantamount to alienation of the land to non-Indians . . . ."); *Wilson, 127 F.3d at 813-15* (same as *Strate*, where plaintiff was a tribal member). Instead, it concerns the effects of state officers' actions that allegedly exceeded the permission given by the Tribe in the search warrants, and alleged damages to property that possibly should not have been seized at all.

We find that the *Montana* presumption against tribal court jurisdiction does not apply in this case. Instead, in line with *Strate* and *County of Lewis*, we look to the tribe's power to exclude state officers from the land at issue. The Tribe's unfettered power to exclude state officers from its land implies its authority to regulate the behavior of non-members on that land. *See Strate, 520 U.S. at 456* (land treated as non-Indian fee land because Tribe "cannot assert a landowner's right to occupy and exclude"); *South Dakota v. Bourland, 508 U.S. 679, 692, 124 L. Ed. 2d 606, 113 S. Ct. 2309 (1993)* ("when Congress has broadly opened up such land to non-Indians [i.e., abrogated the tribe's power to exclude], the effect . . . is the destruction of *pre-existing* Indian rights to regulatory control") (emphasis added); *Brendale v. Confederated Tribes, 492 U.S. 408, 433-448, 106 L. Ed. 2d 343, 109 S. Ct. 2994 (1989)* (opinion of Stevens and O'Connor, JJ.) (tribe can zone non-member

fee land as long as tribe retains power to control access to the land); n9 *Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982)* (tribe has power to regulate structures built by non-members which extend over the lake bed held in trust for tribe). n10

Once a tribe's authority to regulate activities on its land has been demonstrated, civil jurisdiction regarding those activities follows. The Supreme Court made clear in *Strate* that "where the tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate, 520 U.S. at 453.* Any sovereign, even a limited sovereign, must have the power to adjudicate whatever it has the power to legislate. A sovereign who must depend on the courts of another sovereign to adjudicate violations of its own rules is little more than a landowner.

In this case, the Tribe clearly had the power to exclude state officers from its land and to regulate the behavior of state officials present on its land pursuant to limited tribal permission. There was no general cession of jurisdiction by the Tribe; instead there was a controlled, limited permission for state officials to come onto tribal land and comport themselves within to the parameters of that permission. Disputes regarding the officials' behavior under this permission are within the jurisdiction of the Tribe.

Because the tribal court has already ruled on the issue of tribal court jurisdiction, Nevada exhausted its tribal remedies on that issue. The question of tribal court jurisdiction is therefore ripe for federal review. We conclude that the tribal court has subject matter jurisdiction over the claims brought by Hicks against the state officials. n11

B.

Nevada suggests that the actions of the state officials in this case were undertaken as part of their official duties and that therefore the officials should be shielded from liability under a derivative of the doctrine of sovereign immunity. This argument concerns an affirmative defense and is not properly before the court, since the state did not exhaust its remedies regarding the sovereign immunity defense before the tribal court. n12 While the tribal court did find that "it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal

jurisdiction over specially appearing State defendants," this finding was clearly restricted to the issue of personal jurisdiction and did not include any findings regarding the affirmative defense of sovereign immunity. In addition, the tribal court's ruling came before Hicks voluntarily dismissed the State of Nevada and all state defendants named in their official capacities. n13 Therefore, the issue of sovereign immunity as an affirmative defense for state officials named individually in this action has not been considered on the merits by the tribal court. We therefore do not reach the issue.

Nevada also argues that the district court erred in holding that it was precluded by considerations of comity from ruling on the state officials' claims of qualified immunity. Nevada contends that the state officials sued by Hicks were entitled to summary judgment on the issue of tribal court jurisdiction because Hicks failed to overcome their claims of qualified immunity from suit. However, Nevada does not argue that its claim fits into any of the exceptions to the exhaustion requirement. Suggesting that no case has yet determined the existence or nature of the qualified immunity available to state officials in tribal court, Nevada instead invites this court to define the applicable test. We decline to do so.

The Supreme Court in *Strate* reaffirmed its earlier decisions requiring, as a matter of comity and with very narrow exceptions, n14 the exhaustion of tribal remedies before the federal courts rule on the jurisdiction of the tribal courts. *See Strate, 520 U.S. 438, at 448-454, 137 L. Ed. 2d 661, 117 S. Ct. 1404* (discussing *Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987),* and *National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985)); see also Burlington Northern R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir. 1991)* (emphasizing the exhaustion requirement).

The district court correctly applied this exhaustion requirement to the issue of qualified immunity. *See, e.g., Stock West Corp. v. Taylor, 964 F.2d 912, 920 (9th Cir. 1992)* (en banc) (holding that the district court abused its discretion in addressing a qualified immunity defense on the merits, and explaining that "because a determination of this issue will require a careful study of the application of tribal laws, and tribal court decisions, the district

court should have stayed its hand until after the Colville Tribal Courts have the opportunity to resolve the question").

As a preliminary matter, we note that Nevada makes the same mistake with regard to qualified immunity that it made with sovereign immunity, by contending that it is an issue that impacts the subject matter jurisdiction of the tribal courts. The law is clear that qualified immunity, rather than serving as a jurisdictional bar, "is an affirmative defense that must be pleaded by a defendant official." *Harlow v. Fitzgerald, 457 U.S. 800, 815, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); see also Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 n.4, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991)* (noting qualified immunity is an affirmative defense that is "wholly distinct" from issues of jurisdiction). We reject Nevada's contention to the contrary.

Alternatively, Nevada argues that the issue of qualified immunity was in fact exhausted before the tribal court. To this end, Nevada quotes the ruling by the Inter-Tribal Appellate Court affirming the decision of the tribal judge that "the doctrine of . . . qualified immunity does not prevent the Fallon Tribal Court from exerting personal jurisdiction over the State Defendants," and argues that this constitutes a decision on the merits and thus satisfies the exhaustion requirement. However, this argument likewise disregards the fact that qualified immunity is an affirmative defense and not a jurisdictional bar. A holding by the tribal court that it has jurisdiction cannot be construed as a ruling on the merits. The district court did not err in finding that the exhaustion requirement had not been satisfied.

Nevada also argues that, even if the issue of qualified immunity was not exhausted in the tribal courts, it should be treated as having been since Hicks had ample opportunity to respond to the claims of qualified immunity. Nevada suggests that if the tribal court record is bereft of supportive evidence for Hicks' effort to overcome the state officials' individual immunity, it is his own fault.

However, we have never required a party to anticipate another party's qualified immunity defense before the question of subject matter jurisdiction had been decided. *See, e.g., McDonald v. United States, 102 F.3d 1009, 1011 (9th Cir. 1996)* (holding that "there is 'no basis for imposing on the plaintiff an obligation to anticipate such a defense'" of qualified immunity) (quoting *Gomez v. Toledo,*

446 U.S. 635, 640, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980)). The argument by Nevada here again conflates the affirmative defense of qualified immunity with issues relating to the tribal courts' subject matter jurisdiction. The district court did not err in declining to reach the merits of the qualified immunity issue.

Lastly, Nevada argues that Hicks failed to state a claim against William Molini, Director of the Nevada Department of Wildlife, because Molini was not alleged to have participated personally in the acts of the game wardens in obtaining and executing the search warrants and seizing Hicks' property.

The district court noted that "the voluntary dismissal of the official capacity claims by the tribal court may well have made personal and subject matter jurisdiction over Molini . . . inappropriate." However, since "this issue was never before the tribal court because when the motion to quash rulings were made, claims against the state defendants in their official capacities had not yet been voluntarily dismissed," the district court declined to rule on whether a claim had been stated against Molini, "leaving this unexhausted issue to the tribal court." The analysis of the exhaustion requirement set out above applies with equal force here. The district court did not err.

III.

The tribal common law torts and federal and tribal civil rights violations underlying this case occurred on Indian-owned land, the allotment on the Fallon Paiute-Shoshone Reservation held in trust by the federal government for Floyd Hicks. The tribal court has civil jurisdiction in this case based on the Tribe's right to adjudicate disputes arising out of actions within tribal regulatory authority that take place on Indian land. The district court did not err in holding that the tribal court has jurisdiction.

Nevada's claims of sovereign and qualified immunity on behalf of the state officials and of Hicks' failure to state a claim against William Molini have not been exhausted in tribal court. Although exhaustion is not a jurisdictional prerequisite, it is required as a matter of comity. *Strate, 520 U.S. at 453.* The district court did not err in declining to reach the merits of those claims.

AFFIRMED.

DISSENT:

RYMER, Circuit Judge, dissenting:

I part company on subject matter jurisdiction, because I board the train from a different station. As I see it, we have to start with *Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996),* which applies the framework established in *Montana v. United States, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981),* to determine whether there is tribal jurisdiction over civil disputes involving an Indian tribe and non-Indians. Under *Montana*, the Fallon Tribal Court lacks subject matter jurisdiction over Hicks's civil actions because in *Pease* we rejected the proposition that *Montana* is limited to cases involving fee lands owned by non-Indians. As there is no consensual relationship between the Tribe and Nevada law enforcement officials, and subjecting them to suit in tribal court is not necessary to protect the tribes or their members, neither of the *Montana* exceptions to this rule is applicable. As the district court held otherwise, I would reverse.

Along with *Strate v. A-1 Contractors, 520 U.S. 438 (1997), Montana* is the leading opinion discussing tribal sovereignty over non-members of a tribe. In *Montana*, the Court noted that Indian tribes have lost many of the attributes of sovereignty and retain only limited powers, such as the power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *450 U.S. at 564.* As the Court explained, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation," unless the non-members have entered "consensual relationships" with the tribe or its members, or the conduct of the non-Indians on fee land "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id. at 564-66.*

Pease rejects the argument Hicks makes here, that *Montana* only imposes restrictions on a tribe's jurisdiction over fee lands owned by or aligned with non-Indians. In *Pease* we held that a tribal court lacked jurisdiction to entertain a civil action brought by a tribe member against Yellowstone County seeking to enjoin the County's imposition of state property taxes on his (Indian-owned)

reservation property. *96 F.3d at 1173-76.* Pease contended "that *Montana* does not apply to the County's action because *Montana* only imposed restriction on a tribe's jurisdiction over fee land owned by non-Indians." *Id. at 1174.* However, we were unpersuaded "because the issue presented here is whether the tribal court may assert jurisdiction over a non-Indian party (the County), and this court has called *Montana* 'the leading case on tribal civil jurisdiction over non-Indians.'" *Id.* (quoting *FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990)).* [**36] Applying *Montana* and finding neither exception triggered, we upheld summary judgment for the County. As *Pease* is the law of this circuit, we are bound by its directive to apply *Montana* to decide "whether the tribal court may assert jurisdiction over a non-Indian party . . . ." *96 F.3d at 1174. See also* William C. Canby, Jr., American Indian Law 193 (3d ed. 1998) ("The Eighth Circuit, in the decision that the Supreme Court reviewed in *Strate*, and the Ninth [*1033] Circuit have both stated that the tribe's sovereign powers simply do not permit exercise of jurisdiction over nonmembers unless tribal interests are affected, so as to bring the exercise within one of the two *Montana* exceptions." (citing *A-1 Contractors v. Strate, 76 F.3d 930, 939 (8th Cir. 1996)* (en banc) and *Pease, 96 F.3d at 1175-76)).*

Strate further bolsters this view. *Strate* called *Montana* "the pathmarking case concerning tribal civil authority over nonmembers," and reiterated that *Montana* "establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances. " *520 U.S. at 445.* Although *Strate*'s holding that a tribal court lacks jurisdiction over a tort action against a non-member who had an accident with a tribe member on a state right-of-way running through a reservation appears to turn on the fact that the accident there occurred on the state's easement (thus not on Indian land, but on land "aligned" with non-Indians), the Court unambiguously makes *Montana* the relevant law. Finally, even if *Strate* may be construed to signal that *Montana* does not apply to conduct by non-Indians on Indian land, the Court did not expressly say so and until *it* does, we must continue to follow *Pease* and apply *Montana.*

County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) (en banc), also supports the conclusion that there is no tribal civil jurisdiction in this case. In *Allen*, we held that the Nez Perce tribe lacked civil jurisdiction over a member's § 1983 action (very similar to Hicks's action here) against Lewis County, the sheriff and a deputy sheriff because the tribe ceded its right "to exclude state officials engaged in law enforcement activities on the reservation." *Id. at 514.* The Nez Perce had entered into an agreement with Lewis County giving its officers the authority to enter the reservation, investigate minor crimes and make arrests. *See id.* Applying *Strate* and *Montana*, we concluded that "it does not matter how the land was owned because the [tribe's] consent to criminal jurisdiction was tantamount to alienation of the land to non-Indians for this limited purpose." *Id.* We then determined that neither *Montana* exception properly applied to extend tribal jurisdiction over the case. *See id. at 515-16.*

In Hicks's action, Spencer, Ellington and Fitzmorris had obtained Fallon Tribal Court permission to execute the search warrant of Hicks's residence (Spencer receiving permission twice), and thus they had a right to be on the reservation that was no less absolute than Deputy Myers's right in *Allen* and the non-member defendants' in *Strate*. The fact that the Fallon Paiute-Shoshone Tribe granted permission to Nevada law enforcement personnel to come onto the reservation on a case-by-case basis instead of in a blanket agreement does not materially change the analysis. Just as the Nez Perce formally consented to Deputy Myers's presence on their reservation through a prior agreement establishing concurrent criminal jurisdiction within the reservation, *see Allen, 163 F.3d at 514,* the Fallon Paiute-Shoshone formally consented to the presence of Spencer, Ellington and Fitzmorris on their reservation through the Fallon Tribal Court's express approval of their search warrants.

So, the Fallon Tribal Court's consent to execution of the Nevada search warrants "aligned" Hicks's property, albeit temporarily, with the state of Nevada. The Tribe had surrendered its right to exclude Spencer, Ellington and Fitzmorris (at least for the time being), giving them the unqualified right to be on Hicks's property. This case is thus indistinguishable from *Allen* in all material respects. Therefore, I would apply *Montana* and *Allen* and hold that Spencer, Ellington and Fitzmorris's conduct did not

imperil the tribe's power to control its internal affairs, and no applicable exception exists. Spencer only sought to execute the search warrants after obtaining the tribe's consent and assistance.

Accordingly, I would reverse and hold that the tribal court lacks subject matter jurisdiction to entertain Hicks's civil rights actions against the Nevada officials. n1

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n1 For this reason I do not reach the immunity issues.

FOOTNOTES TO APP. A

n1 The district court determined that "the parties have *proceeded* as if the federal civil rights claim alleged is a § 1983 claim for a fourth amendment violation," and assumed for the purposes of the motions before it that a § 1983 claim was alleged. The district court also assumed that the tribal civil rights claims were alleged under ICRA.

n2 The Tribe waived the sovereign immunity of the Fallon Tribal Court and of the tribal judge, Judge Van Walraven, for the limited purpose of defending against Nevada's claims in federal court. Judge Van Walraven issued orders staying each of Hicks' actions pending final resolution of the issue of tribal jurisdiction in federal court.

n3 Nevada asserts before this court that it does not appeal this issue.

n4 *Montana v. United States* involved tribal regulation of hunting and fishing by non-Indians in a river running through the reservation. *450 U.S. at 547.* As a general matter, the Court stated that "the Tribe may prohibit nonmembers from hunting and fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." *Id. at 557.* But, upon finding that the title to the riverbed had passed to the State of Montana, the Supreme Court held that the tribal court lacked jurisdiction. *Id. 566-67.*

In so ruling, the Court articulated a "general proposition" that, on non-Indian owned fee lands, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," with two exceptions: 1) "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements"; and 2) "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id. at 565-66.* Although *Montana* involved only tribal regulation, *Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997)* extended *Montana*'s

principles to tribal court jurisdiction as well. Examining claims that arose from an accident on a stretch of highway across tribal reservation lands, the court stressed the status of that land, which was maintained by the State of North Dakota under a federally granted right-of-way. The federal grant meant that the land was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id., at 454.* Because of this equivalence to non-Indian owned land, the *Montana* rule applied, and the tribe lacked civil authority over the claims.

n5 The first exception, the Court explained, did not apply, despite the fact that A-1 Contractors had a "consensual relationship" with the Tribe through subcontract on the reservation, because the driver of the car was not a party to the subcontract and unaffiliated with the Tribe. *Id. at 457.* The Court also found the second exception inapplicable, stating that "neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id. at 459* (quoting *Williams v. Lee, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)).* As a result, the Court held that the tribal court lacked jurisdiction to hear the case. *Id.*

n6 In her dissent, Judge Rymer relies on Judge Canby's discussion of *Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996)* (holding that tribal court lacked jurisdiction over challenge to county taxation of fee lands within reservation) for the proposition that unless one of the *Montana* exceptions apply, tribal courts do not have jurisdiction over nonmembers. *See* dissent at 657. Judge Canby's discussion, however, emphasizes the fact that *Yellowstone County* was decided before the Supreme Court's decision in *Strate*, and that *Pease* involved claims against nonmembers that arose *outside* the reservation. *See, e.g.*, William C. Canby, Jr., *American Indian Law* 193-195 (1998). *Pease*, therefore, is inapposite here.

n7 It is undisputed that Hicks' residence lies within the Reservation on an allotment held in trust for him by the federal government. Allotments are former tribally held lands that were divided by order of Congress in 1887 into small farm-sized tracts to be held by individuals. *See* Canby, at 270 (1988). For jurisdictional purposes, allotments are considered "Indian country." *See 18 U.S.C. § 1151; see also Oklahoma Tax Comm'n v. Sac and Fox Nation,*

508 U.S. 114, 123, 124 L. Ed. 2d 30, 113 S. Ct. 1985 (1993) (holding that trust allotments are "Indian country" and the equivalent of tribal land for jurisdictional purposes); *DeCoteau v. District County Court, 420 U.S. 425, 427 n.2, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975)* ("While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.").

n8 In fact, the tribal court amended the state court's warrant of August 30, 1990, and restricted its scope "to exterior premises only and to vehicles thereon . . . ."

n9 Though all of the land at issue in *Brendale* was non-Indian fee land, some of the land was within the "closed" portion of the reservation to which the tribe would limit access. Three justices would have found the tribe had inherent authority to zone all reservation land. Four justices would have found no authority under *Montana* to zone non-Indian fee land whether or not the tribe controlled access to the land. Justices Stevens and O'Connor, the deciding votes, held the zoning power of the tribe depends on its ability to control access to the land.

n10 The Supreme Court denied certiorari in *Namen* over the dissent of Justices Rehnquist and White, who hinted that they believed the tribes had no regulatory authority over non-members even when acting on Indian land. *See 459 U.S. 977, 978-79, 103 S. Ct. 314, 74 L. Ed. 2d 291 (1982)* (Rehnquist, C.J. and White, J., dissenting from denial of certiorari).

n11 We note that attempting to enforce the state's criminal laws against a tribal member on the Reservation directly implicates the sovereignty of the Tribe. *See Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003, 24 L. Ed. 2d 494, 90 S. Ct. 551 (1970)* (holding that the arrest of a Navajo Indian on the reservation for extradition pursuant to Arizona law to another state "would clearly interfere with rights essential to the Navajo's self-government") (citing *Williams v. Lee, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)); see also Strate v. A-1 Contractors, 520 U.S. at 459 (1997)* (recognizing an exception to the *Montana* rule "to preserve 'the right of reservati Indians to make their own laws and be ruled by them'" (quoting *Williams, 358 U.S. at 220)).

n12 Sovereign immunity has been treated by this court as an affirmative defense, "whatever its jurisdictional attributes." *ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289, 1291 (9th Cir. 1993).* Thus, the defense is subject to our tribal court exhaustion rule, even though the issues the defense presents are jurisdictional in nature. Indeed, this court has held that "Eleventh Amendment immunity . . . does not implicate a federal court's jurisdiction in any ordinary sense." *Id.* Instead, this kind of immunity is raised and argued by the party seeking its benefit. Such arguments should be heard and decided in the first instance by the Tribal court.

n13 The tribal court's ruling cited here was issued on May 5, 1993. The tribal court granted the plaintiff's motion to dismiss the State of Nevada and all state defendants named in their official capacity on October 10, 1995.

n14 For example, the Court explained that "we do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of opportunity to challenge the court's jurisdiction." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985).* Most recently, the Court found that the "unusual preemption provision" of the Price Anderson Act which expressed Congress' "unmistakable preference for a federal forum, at the behest of a defending party," made tribal court exhaustion of the question of tribal court jurisdiction inappropriate. *El Paso, 526 U.S. 473, 119 S. Ct. 1430, 1437, 143 L. Ed. 2d 635 (1999).*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

State of Nevada, William Molini, Administrator for Nevada Division of Wildlife and Michael C. Spencer, Rich Ellington, and Bill Fitzmorris, as Nevada State Wildlife Wardens and Individually,

Plaintiffs,

vs.

Floyd Hicks, Tribal Court in and for the Fallon Paiute-Shoshone Tribes, Honorable Joseph Van Walraven,

Defendants.

_____/

Case No. CV-N-94-351-DWH

Judge: David W. Hagen

September 30, 1996, Decided
September 30, 1996, FILED; October 1, 1996, ENTERED & SERVED

DISPOSITION:
Plaintiffs' motion for summary judgment (# 33) DENIED. Floyd Hicks' and tribal defendants' motions for summary judgment (# # 34, 35) GRANTED.

OPINION:

MEMORANDUM DECISION AND ORDER

Before the court are the parties' cross-motions for summary judgment (# # 33, 34, 35) n1. For the reasons stated below, plaintiffs' motion for summary judgment (# 33) is denied. Floyd

Hicks's and the tribal defendants' motions for summary judgment (# # 34, 35) are granted.

Background: Facts n2 Leading To The Underlying Litigation

In August 1990, Michael Spencer, a state game warden, applied to the New River Justice Court in Fallon, Nevada for a search warrant to search the premises of Floyd Hicks, a resident of the Fallon-Paiute Shoshone reservation.

Spencer's affidavit averred the purpose of the warrant was to obtain evidence of Possessing or Killing a Big Horn Sheep, in violation of N.R.S. 501.376, a gross misdemeanor. The affidavit also stated: (1) in January of 1989, a confidential informant advised Spencer, a state game warden, that in June of 1988 he saw two dead big horn sheep in the back of a pickup truck owned by Floyd Hicks; (2) the confidential informant also advised that Hicks admitted to possessing the sheep and planning to take them to a taxidermist in Fallon; (3) at 1:00 p.m. on August 30, 1990, Spencer was advised by a special agent of the federal Bureau of Land Management that on August 29, 1990, the agent had observed one big horn sheep head protruding from the trunk of a vehicle on Mr. Hicks's premises; (4) Spencer personally observed a big horn sheep head protruding from a vehicle on Hicks's premises; and (5) no person by the name of Hicks had a current state permit, or "tag", to take big horn sheep.

On August 30, 1990, Spencer received a search warrant from the New River Justice Court to search the residence of Floyd Hicks, a tribal member, apparently on the basis of the January 1989 affidavit. The warrant provided that the issuing court lacked jurisdiction over the Fallon-Paiute Shoshone reservation and that the warrant was valid only if approved by the Fallon Tribal Court. At all relevant times, Hicks resided on his allotted land within the boundaries of the Fallon Paiute-Shoshone Colony and Reservation.

On August 30, 1990, Mr. Spencer sought Tribal Court approval for the warrant to be executed on the reservation. The Tribal Court, Judge Harold presiding, approved the warrant, and modified it to limit the search to the "exterior premises and any vehicles thereon." The warrant was executed on August 30, 1990. One or more mounted big horn sheep heads were removed from Hicks's residence. It was ultimately determined the trophies were not

evidence of any crime or game hunting violation, and they were returned to Hicks.

On June 12, 1991, Spencer again applied for and received a search warrant. This warrant was executed that same day. Spencer was accompanied by tribal police officers at the time he executed both warrants. One or more mounted bighorn sheep heads were removed from Hicks's residence. Once again, it was ultimately determined the trophies were not evidence of any crime or game hunting violation, and they were returned to Hicks.

Disputed Issues in the Underlying Litigation

Disputed issues in the underlying litigation include, but are not limited to, the facial sufficiency of the affidavits supporting the state search warrant applications, the validity of the search warrants themselves, the legality of the tribal court orders authorizing execution of the state warrants, the reasonableness of the game wardens in relying on those orders, the reasonableness of the searches, and the reasonableness of the seizure of property belonging to Hicks.

Procedural Background

Plaintiffs brought this action to enjoin prosecution of two civil actions in Fallon Tribal Court against the State of Nevada, William Molini, Administrator for Nevada Division of Wildlife, and Michael C. Spencer, Rich Ellington, and Bill Fitzmorris, as Nevada State Wildlife Wardens and individually. Plaintiffs seek a declaration that the Fallon Tribal Court may not exercise jurisdiction over the State of Nevada and its officers and employees, whether in their official or individual capacities.

Hicks filed the two actions at issue here in Fallon Tribal Court; one, FT 91-034, on July 8, 1991; the other, FT 92-031, on June 22, 1992. The complaints alleged a variety of claims, including claims under the Indian Civil Rights Act, *25 U.S.C. § 1302,* wrongful civil proceedings, unreasonable search and seizure, trespass to land, trespass to chattels, abuse of process, and infliction of emotional distress. By amended complaint, Hicks also claimed violation of unspecified federal and tribal civil rights. The parties have proceeded as if the federal civil rights claim alleged is a § 1983 claim for a fourth amendment violation, and for the purposes of the motions before the court, the court assumes a § 1983 claim is

included. Presumably, the tribal civil rights claims are asserted under ICRA.

Hicks originally attempted service by certified mail. The defendants moved to quash service of process on the grounds of state sovereign immunity, limited immunity, and defective service. On May 3, 1993, the tribal court, Judge Van Walraven presiding, ruled that it was adopting NRCP 4 for the duration of the Hicks litigation. On May 5, 1993, the court recognized plaintiffs' ineffective service argument and quashed service of process upon the state defendants. On May 21, 1993, the court authorized service by publication. Mr. Hicks published. The state then renewed its motion to quash and on February 2, 1994, the court again quashed service. The Intertribal Appellate Court, in a May 13, 1994, decision, reversed and remanded to the Fallon Tribal Court for trial. On June 1, 1994, plaintiffs filed this action in federal court.

On June 16, 1994, Judge Van Walraven issued orders staying each of Hicks's actions pending final resolution of the issue of tribal jurisdiction in federal court. Because the stay orders effectively mooted plaintiffs' motion in this court for preliminary injunction, on June 20, 1994, plaintiffs stipulated to voluntary withdrawal of that motion, and this court entered an order to that effect (# 18).

The Tribe, via resolution of the Fallon Business Council, has waived the sovereign immunity of the tribal defendants, i.e., the Tribal Court and Judge Walraven, for the limited purpose of defending, in this federal court action, plaintiffs' claims for declaratory relief regarding the issue of tribal court jurisdiction. Fallon Business Council Resolution No. 94-F-074.

The state defendants, the tribal defendants, and Floyd Hicks have each moved for summary judgment on the issue of the tribal court's jurisdiction over the state defendants under federal law. (# 33, 34, 35). Pursuant to agreement of all parties, this case is presented to the court on cross-motions for summary judgment. On October 10, 1995, the Tribal Court granted plaintiff's motions to voluntarily dismiss the state defendants in their official capacities from FT 91-034 and FT 92-031. This court ruled (# 55) that these dismissal orders of the Tribal Court have mooted the issue of tribal court jurisdiction over the state defendants in their official capacities n3.

Oral argument on the summary judgment motions was presented to the court on October 16, 1995, and the motions were submitted on that date. On March 29, 1996, the court issued an order (# 55) denying, without prejudice, all three motions for summary judgment (# # 33, 34, 35) and ordering supplemental briefing. The order specified that submission of supplemental briefs would be deemed a renewal of the summary judgment motions. Each party has submitted supplemental briefs and the motions (# # 33, 34, 35) are deemed renewed and ripe for decision.

Personal Jurisdiction Over State Defendants in Their Individual Capacities: Due Process and the Question of Service

Any question regarding tribal court jurisdiction over the state defendants in their official capacity is moot. *See* (# 55); *see also supra* note 3. Therefore, the court will only address those arguments made by the parties with reference to the individual capacity claims.

As a preliminary matter, the court agrees with the analysis of the Intertribal Court of Appeals on the issue of service of process n4. The Intertribal Court identified the issue as one of federal constitutional due process, and reversed the order quashing service on the grounds that service was in accordance with tribal law as adopted by Judge Van Walraven n5, and that *Mullane's* due process notice requirement was satisfied. *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950).*

The Intertribal Court found service by publication to be proper and effective under both tribal and federal constitutional law. The court reasoned that Judge Van Walraven was authorized by the tribal code to adopt provisions of NRCP as a guide, he had in fact adopted NRCP 4 in the Hicks case, he had judicial power to interpret tribal law as codified in the Law and Order Code and as adopted pursuant to the Code in his court, and the Nevada courts' interpretations of NRCP 4 are not binding on the tribal court because the "meld" of adopted Nevada procedural rule in combination with the Law and Order Code and other sources of tribal law produces a unique and valid result. The court further held that Judge Van Walraven's order adopting NRCP 4 was not subject to post-hoc oral modification after Hicks relied on it n6.

Plaintiffs have not persuaded this court that the Intertribal Court of Appeals decided this issue erroneously. This court defers to

tribal court determinations of tribal law unless they implicate substantial federal questions. *Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994), cert. denied, 130 L. Ed. 2d 398, 115 S. Ct. 485 (1994).* The only substantial federal question implicated in the court's ruling on service is that of due process. The Intertribal Appeals Court decided this issue correctly. In the leading case on due process in the service context, *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court stated,

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance. But if due respect for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. *339 U.S. 306, 314-15 (1950).*

The "practicalities and peculiarities" of this case include the following: the complaint in CV-FT-034 was stamped "service made and accepted this 16th day of July 1991" and signed by Sherry Porter, Deputy Attorney General; the individual defendants were initially served by certified mail sent out by the court itself; the defendants had actual notice as evidenced by their special appearance to quash service; and service by publication was expressly authorized by the tribal court. No reasonable argument can be made that on the facts in this case, defendants did not receive notice reasonably calculated to apprise them of the action and give them an opportunity to be heard, that they were not afforded reasonable time to make an appearance, or that necessary information was not conveyed. The court finds that service met with the constitutional due process requirements of *Mullane*.

Furthermore, the court finds that by executing the search warrant on the premises of Hicks's allotment n7, the individual game warden defendants purposefully availed themselves of the privilege of conducting activities within the exterior boundaries of the reservation and on tribal land. *See Hanson v. Denckla, 357 U.S.*

235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). See also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power . . . to place conditions on entry, on continuous presence, or on reservation conduct . . . A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power."). Clearly, the dispute arises out of those contacts. Thus, as a matter of due process, the court finds the exercise of personal jurisdiction to comport with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).*

Exhaustion of Tribal Remedies

In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians* n8, the Court held that "the question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the jurisdiction of a tribal court is one that must be answered by reference to federal law." *471 U.S. 845, 852 (1985).* However, the Court, emphasizing the Congressional "policy of supporting tribal self-government and self-determination", the desirability of developing a full record prior to federal review, and the goal of enhancing the legitimacy of tribal courts, required exhaustion of tribal court remedies before a federal court could hear a challenge to "either the merits or any question concerning appropriate relief." *Id., 856.*

In *Iowa Mutual Insurance Co. v. LaPlante* n9, citing *Merrion v. Jicarilla Apache Tribe* n10, the Court emphasized that a tribe retains all the inherent attributes of sovereignty not previously invalidated by federal law. The Court stated, "civil jurisdiction over [activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *480 U.S. 9, 18 (1987).*

National Farmers and *Iowa Mutual* "place a strict premium on precise and rigorous tribal court analysis of its own jurisdictional parameters." Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction, 31 Ariz. L. Rev. 329, 331 (1989).* The crucial questions for the tribal court are (1) whether the tribal court is empowered by tribal law to hear a particular kind of case; and (2) whether tribal court authority is limited by federal

law. The Court in *National Farmers* described the necessary analysis as requiring "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers, 471 U.S. 845, 855-56, 85 L. Ed. 2d 818, 105 S. Ct. 2447.*

Thus, the extent to which tribal law authorizes jurisdiction is a question which should be answered by the tribal court in the first instance. In this case, the Intertribal Court of Appeals definitively answered this question. While admittedly the Court did not memorialize its reasoning in the historical depth and legal detail contemplated by *National Farmers*, the parties have exhausted their tribal remedies and the matter is now properly before this court.

Tribal Civil Adjudicatory Jurisdiction, Generally

The contours of tribal civil adjudicatory jurisdiction over in Indian country are unclear for several reasons. No federal statutes provide guidance. The federal caselaw, while clearly mandating exhaustion of tribal remedies in the first instance, "fails to establish clear-cut guidelines for deciding in what circumstances tribal court jurisdiction is appropriate." Pommersheim, 331. However, the Supreme Court's opinions as far back as *Worcester v. Georgia* n11 suggest that, in contrast to criminal jurisdiction, which the Court views as purely membership-based, tribal court civil jurisdiction has a strong geographic component n12. The Ninth Circuit explicitly recognized this principle in *United States v. Plainbull*, stating "tribal courts are appropriate forums for the exclusive adjudication of disputes taking place within the boundaries of a reservation." *957 F.2d 724, 727 (9th Cir. 1992)* n13.

Felix Cohen, an oft-cited expert on federal Indian law, has described the backdrop against which the tribal jurisdiction analysis is conducted as follows:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by an adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the power of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of the sovereignty of the tribe, e.g., its power to enter into treaties with foreign

> nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

F. Cohen, Handbook of Federal Indian Law 123 (1942 ed.).

The continuing application of these overriding principles is readily gleaned from subsequent Supreme Court caselaw. In *Williams v. Lee*, a suit brought against a Navajo defendant by a non-Indian owner of a store on the Navajo reservation, the Court held that the state court lacked jurisdiction over the dispute. *358 U.S. 217 (1959).* The Court reasoned that allowing state court jurisdiction over disputes arising on the reservation and involving significant tribal interests would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe upon the right of the Indians to govern themselves." *Id., 223.*

In *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978),* the Court held the Indian Civil Rights Act (ICRA) does not provide a civil cause of action in federal court n14, reasoning that because "tribal forums are available to vindicate rights created by the ICRA", an implied federal right of action was unnecessary. The Court cited *William v. Lee* for the proposition that "tribal courts have been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property rights of both Indians and non-Indians." *Id., 66.*

Jurisdiction Over State Defendants In This Case

Here, the tribal court has asserted jurisdiction, and the Intertribal Court of Appeals has affirmed. A tribal court's interpretation of tribal law is binding on this court. *Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir.1994).* However, the extent of tribal court jurisdiction is a federal question. *National Farmers, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985). Hinshaw* precludes a federal court from second-guessing a tribal court's own reading of tribal law, while *National Farmers* reserves the ultimate decision on tribal jurisdiction to federal courts. These two principles require federal courts to determine *de novo* whether the tribal court has asserted its jurisdiction beyond lawful limits; the applicable limits are those set by federal law. *National Farmers, 471 U.S. 845, 85 L.*

Ed. 2d 818, 105 S. Ct. 2447 (1985). Thus, the questions for this court are whether the Intertribal Court of Appeals erred, as a matter of federal Indian law, in holding that the tribal court properly exercised jurisdiction over the underlying litigation in the first instance.

Montana v. United States, the Presumption of Retained Sovereignty, and the Rule of Implicit Divestiture

Defendants argue that because the underlying events occurred on tribal territory, this court must presume the tribe possesses inherent sovereign jurisdiction until plaintiffs rebut the presumption with a showing of express divestiture by Congress; they further argue that plaintiffs have not and cannot make that showing. In contrast, plaintiffs argue the presumption urged by defendants does not apply because under *Montana v. United States*, the power of civil adjudication over a person not a member of the tribe has been implicitly divested as inconsistent with the tribe's status as a domestic dependent nation. The resolution of this dispute requires an examination of the nature and applicability of the Supreme Court's holding in *Montana v. United States. 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981).*

In *Montana*, the Supreme Court held the dependent status of Indian tribes implicitly divested them of power to regulate the conduct of non-members on fee land no longer owned by the tribe. However, the opinion carefully reiterated that tribes retain significant civil jurisdiction over non-Indians on their reservations:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe. *Id.*

Although *Montana* recognized the existence of retained n15 sovereignty, it appeared to sharply curtail the scope of that sovereignty. The Court set forth a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" and further stated that tribal sovereignty over nonmembers "cannot survive without express

congressional delegation." *450 U.S. at 564.* This broad language seemed to inexplicably reverse the traditional presumption set forth in *Williams v. Lee*, which stated "this court has consistently guarded the authority of Indian governments over their reservations . . . if this power is to be taken away from them, it is for Congress to do it." *358 U.S. 217, 222 (1959).* In other words, whereas *Williams* presumes tribal power unless divested n16, *Montana* appears to presume power over nonmembers has been lost, unless one of the two specified exceptions applies.

No Supreme Court case explains the reversal of the *Williams* presumption, and post-Montana cases have followed the *Montana* rule inconsistently, if at all. An opinion handed down shortly before *Montana, Washington v. Confederated Tribes of the Colville Indian Reservation*, stated "tribal powers are not implicitly divested by virtue of the tribes' dependent status." *447 U.S. 134, 153-154 (1980).* In a case decided one year after the *Montana* decision, *Merrion v. Jicarilla Apache Tribe*, the Court, expressly rejecting an implicit divestiture argument, held that the power to impose a severance tax on oil and gas extracted from tribal lands by nonmember lessees was inherent in the tribe's power as a sovereign nation. *455 U.S. 130, 144, 149-150 (1982). National Farmers* and *Iowa Mutual*, both post-Montana cases, reiterate the presumption of retained sovereignty, without any attempt to reconcile these formulations with Montana's apparent reversal of the *Williams* presumption. However, more recent cases have returned to *Montana. See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 425, 106 L. Ed. 2d 343, 109 S. Ct. 2994 (1989); South Dakota v. Bourland, 508 U.S. 679, 113 S. Ct. 2309, 2315 n.6, 124 L. Ed. 2d 606 (1993).*

Because *Montana, Brendale*, and *Bourland* involved challenges to a tribe's power to regulate, and *National Farmers* and *Iowa Mutual* involved challenges to a tribe's power to adjudicate tort claims against a non-member, the different formulations of the "general rule" may be a result of the Supreme Court's implicit recognition of a principled distinction between tribal adjudicatory jurisdiction and tribal regulatory jurisdiction n17. The Ninth Circuit made this distinction in its *National Farmers* opinion, but the Supreme Court did not address it. *Compare National Farmers Union Ins. v. Crow Tribe, 736 F.2d 1320, 1321 n.3, 1323 and n.4*

(9th Cir. 1984) with National Farmers Union Ins. v. Crow Tribe, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985). Several commentators have argued persuasively that a distinction between tribal regulatory and adjudicatory jurisdiction has been reflected, albeit implicitly, in the Supreme Court's opinions n18. The recognition of this distinction would resolve the apparent inconsistency between the Supreme Court's formulation of the rule in *National Farmer's* and *Iowa Mutual*, which trumpeted a vital presumption of retained jurisdiction unless a challenger proved divestment, and the arguably narrower *Montana* view of sovereignty.

Yellowstone County v. Pease

In *Yellowstone County v. Pease* n19, the Ninth Circuit cited with approval a portion of the Eighth Circuit's *en banc* opinion in *A-1 Contractors v. Strate* n20, integrating the *Montana* rule with the presumption of retained sovereignty as reiterated in *Iowa Mutual* and other cases, into one coherent rule:

A valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a . . . nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the . . . nonmember unless that jurisdiction is affirmatively limited by federal law. *Pease, 1996 WL 512363, 512366* (9th Cir.), quoting from *A-1 Contractors, 76 F.3d 930, 938-39 (8th Cir. 1996)* (*en banc*).

Montana

If the rule in *A-1 Contractors* is now indeed the law of the Ninth Circuit, it certainly provides [**29] a helpful framework. However, it does not significantly alter this court's analysis in this case. Under either the *A-1 Contractors* formulation or under *Montana*, the court finds tribal jurisdiction properly asserted. Assuming, *arguendo*, the *Montana* rule controls, the court finds *Montana* does not preclude tribal jurisdiction in this case.

As a threshold matter, the court notes that the *Montana* decision involved the tribe's jurisdiction over fee lands within reservation boundaries. A finding of implicit divestiture of tribal authority over conduct occurring on land no longer owned by the tribe n21 and which has not been demonstrated to "threaten or have some direct effect on the political integrity, the economic security, or the health

and welfare of the tribe" has limited application to the issue presented here.

Providing a forum for reservation-based tort actions, even where constitutional torts are alleged, falls within both *Montana* exceptions. Mr. Hicks, a member of the Tribe, has alleged his federal civil rights were violated on tribal land. The tribal code provides for jurisdiction over all civil causes of action arising within the territorial jurisdiction of the court, and specifies that entry upon such territory constitutes consent to the jurisdiction of the court. Furthermore, tribal law provided very specific restrictions on the execution of extraterritorial search warrants on the reservation. These tribal law provisions are directly applicable to the facts in this case and clearly show that the tribe viewed the execution of state search warrants on the reservation as bearing directly on the political integrity of the tribe. *See Montana, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981).* By enacting such provisions, the tribe has asserted its interest in adjudicating such disputes.

Even without tribal statutory law in this area, this court would presume that the Tribe has an interest in providing Mr. Hicks, and any other tribal member similarly situated, a forum in which to vindicate these rights. As recognized by the Supreme Court in *National Farmers*, tribal self-government and self-determination are inextricably linked to the continuing enhancement of the legitimacy of the tribal courts. *471 U.S. 845, 856 (1985).* Furthermore, the tribal courts' legitimacy should not be measured solely by how closely it approximates the operation of the federal courts n22, or how exactly its adjudications correspond with federal or state caselaw. "If the word "sovereign" has any meaning in contemporary federal courts' jurisprudence, its meaning comes from a state's or tribe's ability to maintain different modes from the federal government." Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U.Chi. L.Rev. 671, 749 (1989).* Tribal courts must be permitted to be "jurisgenerative" if they are to thrive. *See id., 751* (citing Robert Cover, *Nomos and Narrative, 97 Harv.L.Rev. 4, 28).* "If justice is a product of conversation rather than unilateral declaration, it is more likely to be achieved in the context of respectful dialogue rather than

majoritarian conclusions about the 'other'." Frank Pommersheim, *Braid of Feathers* 193 (1995).

Although the issue presented here is one of first impression, the court is satisfied that this ruling is consistent with the federal caselaw. Ninth Circuit law has not found *Montana* to restrict tribes' adjudicatory jurisdiction over non-members. To the contrary, the Ninth Circuit cases reaffirm the concept of retained sovereignty as restated in *Iowa Mutual* and *National Farmers. See, e.g., Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), cert. denied, 499 U.S. 943, 113 L. Ed. 2d 459, 111 S. Ct. 1404 (1991); Wellman v. Chevron, 815 F.2d 577 (9th Cir. 1987); Yellowstone County v. Pease, 1996 WL 512363* (9th Cir.).

The presence of federal law issues in the tribal court litigation does not compel the conclusion that tribal court jurisdiction may not lie. *See Middlemist v. Lujan, 824 F. Supp. 940 (D.Mont.1993), aff'd without opinion, 19 F.3d 1318 (9th Cir. 1994), cert. denied, 115 S. Ct. 420 (1994). See also Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1986)* ("Unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."); *Altheimer & Gray v. Sioux Mfg. Co., 983 F.2d 803, 814 (7th Cir. 1993), cert. denied, 510 U.S. 1019, 114 S. Ct. 621, 126 L. Ed. 2d 585 (1993)* ("[a] tribal court, presumably, is as competent to interpret federal law as it is state law"). Nor does the non-Indian status of the defendant. *Williams v. Lee, 358 U.S. 217, 223, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)* ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . If this power is to be taken away from them, it is for Congress to do it."); *Hinshaw v. Mahler; see also Cardin v. Cruz, 671 F.2d 363, 366 (9th Cir. 1982), cert. denied, 459 U.S. 967, 74 L. Ed. 2d 277, 103 S. Ct. 293 (9182)* (to hold otherwise would "reduce to a nullity the Supreme Court's repeated assertions that Indian tribes retain attributes of sovereignty over their territory, not just their members" [internal citations omitted]).

Nor does the status of the state defendants as state actors argue persuasively against jurisdiction. The Supreme Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory", *United States v. Mazurie* n23, and that "tribal sovereignty is dependent on, and subordinate to, only the federal government, not the States." *Washington Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980).*

Conclusion

Mr. Hicks seeks a remedy for the violation of his constitutional and common law rights. He chose to seek those remedies in the Fallon Tribal Court. The Tribal Court has asserted jurisdiction over his lawsuit. State defendants point to no law, statutory or decisional, which persuades this court he cannot proceed in tribal court.

As the Supreme Court has clearly stated, it is not the role of the federal courts to abrogate tribal sovereignty n24. Both *National Farmers* and *Iowa Mutual* contemplated post-exhaustion federal court review of tribal jurisdictional holdings. This court reads that mandate conservatively; in the court's view, the task before it is to evaluate the tribal court's assertion of jurisdiction in light of federal Indian law as it stands today, not to create new federal common law further restricting tribal jurisdiction. The presumption is in favor of tribal court jurisdiction. *Iowa Mutual, 480 U.S. 9, 18, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1986).* Implicit divestiture will not be found unless "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government n25", as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or [criminally] prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-154, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980).*

This court has found valid tribal interests to be at issue. *See Yellowstone County v. Pease, 1996 WL 512363, 512366* (9th Cir.) (citing *A-1 Contractors v. Strate, 76 F.3d at 938-39 (8th Cir.1996) (en banc)*. Plaintiffs have failed to prove the jurisdiction asserted by the tribe is affirmatively limited by federal law. No express congressional divestment of the tribe's presumed inherent

jurisdiction, or "an overriding federal interest that would necessarily be frustrated" by the exercise of tribal jurisdiction, has been shown. *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 154 (1980).* Therefore, this court concludes that the Fallon Tribal Court has jurisdiction to adjudicate Hicks's claims against the state defendants in their individual capacities.

Qualified Immunity

Plaintiffs argue for summary judgment in favor of the state defendants in their individual capacities on several grounds. First, they argue that Hicks failed to make the requisite pleading and showing necessary to overcome the individuals' claims of qualified immunity as state officers and employees. They claim the issue was raised, argued and briefed in the tribal court proceedings, the tribal court failed to adequately address these arguments when they were presented, and erred as a matter of law by denying them immunity.

The tribal trial court held that qualified immunity did not serve as a jurisdictional bar, and the tribal appellate court affirmed. This court agrees. As a matter of federal law, qualified immunity is not a jurisdictional bar to suits against a state official in his individual capacity, but rather an affirmative defense. *See Harlow v. Fitzgerald, 457 U.S. 800, 815, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1991).* Therefore, the court affirms the Intertribal Appellate Court's ruling on qualified immunity as a jurisdictional issue.

To the extent that the parties dispute whether qualified immunity is available to the state defendants as a defense, the court finds that question was not exhausted in the tribal courts n26. While mindful of the policy reasons behind the general rule that issues of qualified immunity ordinarily be decided long before trial, *see Hunter v. Bryant, 502 U.S. 224, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991),* the court is unwilling to disregard the exhaustion rule to decide that issue. Although plaintiffs argue that the tribal court "implicitly" ruled on the defense, the court disagrees. The tribal court did not hold an evidentiary hearing or make definitive findings of fact or conclusions of law on the application of the qualified immunity defense to the facts of this case. The court held only that qualified immunity was not a jurisdictional bar to tribal court jurisdiction in the first instance. n27 Therefore, this court does not reach the issue of qualified immunity as a defense to the

underlying claims. *See Crawford v. Genuine Parts Co., 947 F.2d 1405, 1408 (9th Cir.1991), cert. denied, 502 U.S. 1096, 117 L. Ed. 2d 419, 112 S. Ct. 1174 (1991)* ("When the dispute is a reservation affair . . . there is no discretion not to defer n28").

Claims Against Molini

At oral argument, the court questioned whether Hicks states a claim against William Molini in his individual capacity, as it appeared no specific facts were alleged as to his personal participation in the allegedly unconstitutional and tortious acts of the wardens in obtaining and executing the search warrant and seizing Hicks's property.

The voluntary dismissal of the official capacity claims by the tribal court may well have made personal and subject-matter jurisdiction over Molini in CV-FT-034 n29 inappropriate. This issue was never before the tribal court because when the motion to quash rulings were made, claims against the state defendants in their official capacities had not yet been voluntarily dismissed. Therefore, the court declines to rule on whether a claim has been stated against Molini, leaving this unexhausted issue to the tribal court. *See Crawford, 947 F.2d 1405 (9th Cir. 1991).*

For the reasons set forth in this opinion, IT IS ORDERED that plaintiffs' motion for summary judgment (# 33) is DENIED. Floyd Hicks' and the tribal defendants' motions for summary judgment (# # 34, 35) are GRANTED.

DATED: September 30, 1996.

David W. Hagen
UNITED STATES DISTRICT JUDGE

FOOTNOTES TO APP. B

n1 In a March 29, 1996, order, these motions were denied without prejudice. The court's order provided that the filing of supplemental briefs ordered by the court would be deemed a renewal of the original summary judgment motions. All parties have filed supplemental briefs and the motions are now before the court.

n2 No evidentiary hearings were held before this court. These facts are gleaned from material in the record before the court and are given as background only; they are not intended to be this court's official findings of fact.

n3 Plaintiffs argued for summary judgment in favor of the state officials on the grounds of sovereign immunity. In light of *Nevada v. Hall, 440 U.S. 410, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979),* it is far from clear that sovereign immunity would provide a basis for summary judgment in plaintiffs' favor. However, this issue has been mooted by Hicks' voluntary dismissal of the official capacity claims against the state officials.

At oral argument, counsel for the State of Nevada cited *Native Village of Noatak v. Blanchard, 38 F.3d 1505 (9th Cir. 1994),* for the proposition that voluntary cessation of illegal conduct does not render moot a challenge to that activity. Thus, counsel argued, the court should reconsider its conclusion that the sovereign immunity issue is now moot. The court is unpersuaded. In Blanchard, a challenge to an Alaska statute was mooted by the statute's repeal. The case analyzed two exceptions to the mootness doctrine. One, "capable of repetition yet evading review", allows resolution of an otherwise moot legal issue when there is a reasonable likelihood that the plaintiff will again be subject to the same injury, and the injury suffered is of a type "inherently limited in duration such that it is always likely to become moot before federal court litigation is completed." *Id. at 1509.* The second exception to the mootness doctrine, "voluntary cessation", applies when a defendant voluntarily ceases improper conduct in response to a lawsuit but the plaintiff has a reasonable expectation that the illegal action will recur. *Id. at 1511.*

Neither of the two exceptions are applicable to this case. A suit brought in tribal court against the State of Nevada and state officials acting in their official capacities does not fall within the "capable of repetition yet evading review" exception because no likelihood of repeat litigation has been shown and such a suit is not inherently limited in duration such that it is always likely to become moot before federal court litigation is completed. Nor would such a suit fall within the "voluntary cessation" exception, as the state has made no showing of a reasonable expectation that the suit against the state defendants will be reinstated. The mere fear of a possible future injury is insufficient to invoke the "voluntary cessation" exception; "federal courts are not authorized to address such theoretical possibilities." *Id. at 1510.*

n4 Although the parties have not addressed themselves to the propriety of service in their arguments to this court, the court finds it necessary and appropriate to address it because it was one of the bases upon which the Intertribal Court found tribal jurisdiction.

n5 At a March 3, 1993 hearing on the first motion to quash, Judge Van Walraven noted that the jurisdictional provisions of the Fallon Tribes Law and Order Code did not provide for any specific method of service of process outside the exterior boundaries of the reservation. On March 4, 1993, Hicks petitioned the court for an order allowing service by publication. On May 5, 1993, Judge Van Walraven quashed service, stating, in part, "there being no proof of service on file showing that the Court's service of the specially appearing defendants was made on the Fallon Indian Reservation or Colony, or in accordance with Nevada Rules of Civil Procedure (NRCP), Rule 4, adopted by Tribal Law, service on the specially appearing State defendants by Certified U.S. Mail fails."

Pursuant to Fallon Tribes Law and Order Code § 1-30-040, tribal judges are empowered to use the Nevada Rules of Civil Procedure as a guide as long as such use does not "impede the administration of justice nor contravene the application of any Tribal law or custom of federal law nor to produce any absurd result nor impose any regulatory scheme or policy not contemplated by the Tribe nor to interfere with the Tribe's law or policies on any subject regulated by the Tribe." Although the May 5, 1993, order is somewhat ambiguous, the court's May 21, 1993, order clarifies that the court had adopted NRCP 4.

n6 Hicks also relied on the court's order allowing service by publication.

n7 These facts are adequately established by the record and are not disputed by the parties.

n8 *471 U.S. 845 (1985).* In *National Farmers*, a Crow Indian injured in a motorcycle accident in a school parking lot on fee land within the Crow Indian Reservation sued a state school district in tribal court. The school district's insurance company sought to collaterally attack a default judgment against it in federal court.

n9 *480 U.S. 9 (1987).*

n10 *455 U.S. 130 (1982).*

n11 *31 U.S. (6 Pet) 515, 556 (1832).* In this opinion, Chief Justice Marshall described the Indian tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive." The Supreme Court has since rejected this absolute rule of exclusive jurisdiction, *see Oliphant v. Suquahamish Tribe, 435 U.S. 191, 212, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978),* but territory remains a determining factor in many jurisdictional determinations.

n12 *See* Allison M. Dussias, *Geographically-Based and Membership Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision, 55 U.Pitt.L.Rev. 1 (1993); see also Williams v. Lee, 358 U.S. 217, 223, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)* ("[Respondent] was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . If this power is to be taken away from them, it is for Congress to do it."; *Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987)* (Tribal jurisdiction over tribal territory exists unless specifically divested or diminished by Congress).

n13 The court, citing *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978), Williams v. Lee, 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959),* and *Iowa Mutual v. LaPlante, 480 U.S. 1, 15 (1986),* stated, "deference to tribal courts with regard to tribal affairs is a fundamental tenet of federal jurisprudence." *Id.*, 728. The court referred once again to "activities occurring inside reservation boundaries" before

concluding "because the Plainbulls grazed their cattle on reservation land without obtaining a tribal permit", and "the alleged trespass was to tribal land", plaintiffs should have filed in tribal court. *Id.*

n14 The only federal remedy expressly made available under ICRA is the writ of habeas corpus.

n15 The Supreme Court recognizes adjudicatory jurisdiction as an element of "retained" sovereignty even though "tribal courts in the Anglo-American mold were [historically] virtually unknown". *See Iowa Mutual v. LaPlante, 480 U.S. 9, 17, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987).*

n16 *Williams v. Lee* recognized the authority of tribal courts over Reservation affairs involving nonmembers. *358 U.S. 217 (1959).* In *United States v. Wheeler*, the Court held that Indian tribes possessed those aspects of sovereignty not withdrawn by treaty, statute or by implication as a necessary result of their status as domestic dependent nations. *435 U.S. 313 (1978).* Later, in *Oliphant*, the Court utilized the new *Wheeler* doctrine of implicit divestiture, which severely eroded the *Williams v. Lee* presumption, to invalidate tribal criminal jurisdiction over nonmembers. *435 U.S. 191 (1978).* In *National Farmers*, the Supreme Court rejected the claim that implicit divestiture extends to civil adjudicatory jurisdiction over nonmembers. And, in *Iowa Mutual*, the Court, noting that Congress had never expressed an intent to limit the civil jurisdiction of the tribal courts, stated that jurisdiction is presumed unless affirmatively limited by treaty or federal statute.

n17 "[Regulatory, or legislative, jurisdiction] refers to the authority of a state to make its law applicable to persons or activities and is quite a separate matter from jurisdiction to adjudicate." *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S. Ct. 2891, 2918, 125 L. Ed. 2d 612 (1993)* (Scalia, J., dissenting) (internal citations omitted).

n18 *See, e.g.*, Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction, 73 N.C.L.Rev. 1089, 1128-29, 1141-49 (1995).* Reynolds points out that federal courts have entertained challenges to tribal regulatory jurisdiction since *Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823),* but had not heard a challenge to a tribe's adjudicatory jurisdiction until *National Farmers* in 1985. In that

opinion, the Court announced the rule that all challenges to tribal jurisdiction, both regulatory and adjudicatory, are federal questions. *See also*, Joseph Singer, *Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook, 24 N.M.L.Rev. 315, 316-17, 325-27 (1994).* Professor Singer criticizes the *Deskbook*, a treatise by a group of Attorneys General from western states, for "advancing [the Attorneys General's] own political agenda by relying on the narrower view of sovereignty put forth in the legislative jurisdiction cases [*Montana, Brendale* and *Duro v. Reina*], while ignoring the Court's endorsement of tribal sovereignty as reflected in *National Farmers* and *Iowa Mutual*." Reynolds, *73 N.C.L.Rev. 1098, 1157 n.277.*

The Ninth Circuit has recently expressed skepticism about the existence of an adjudicatory/regulatory distinction. *See Yellowstone County v. Pease, 1996 WL 512363, 512366* (9th Cir.). However, the court previously recognized the distinction in *National Farmers, see 736 F.2d 1320, 1321 n.3, 1323 and n.4 (9th Cir. 1984),* and has not subsequently held the distinction invalid.

n19 *1996 WL 512363* (9th Cir.).

n20 *76 F.3d 930, 938-39 (8th Cir. 1996).*

n21 *Montana's* holding prohibiting regulation of nonmember hunting and fishing on fee lands owned by nonmembers rested on findings that (1) property rights in the river bed had never been conveyed to the tribe by the United States; and (2) no clear relationship to tribal self-government existed because the riparian land was no longer owned by the tribe. In contrast, in this case, the parties do not dispute that the events at issue here occurred on land allotted to Mr. Hicks, a member of the tribe, and within reservation boundaries.

n22 The record indicates the Fallon Tribal Court and the Intertribal Court of Appeals follow an essentially Anglo-American mode of operation. At the October 16, 1995, summary judgment hearing, counsel for defendants represented to this court that Hicks expects federal substantive law to govern his federal law claims in the tribal court. However, these facts are not dispositive here. Many tribal court systems have exhibit a meld developed from an interaction between federal regulation and Indian tribal customs. In some tribes, federal notions of separation of powers and tripartite government are not strictly observed; "tribal councils may act as

appellate bodies as well as executive decision makers . . . the sources of law, permissible styles of argument, and structure of the proceedings may vary substantially from what practitioners have come to expect in federal courts." Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U.Chi.L.Rev. 671, 737 (1989).* While in an extreme case, a confluence of these factors might provide a basis for overturning a final tribal court decision, neither the procedural posture nor the facts of this case make such a decision appropriate here.

n23 *419 U.S. 544, 557 (1975). See also Cardin v. Cruz, 671 F.2d 363, 366 (9th Cir. 1982)* (to hold otherwise would "reduce to a nullity the Supreme Court's repeated assertions that Indian tribes retain attributes of sovereignty over their territory, not just their members" [internal citations omitted]).

n24 "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Iowa Mutual, 480 U.S. 9, 18, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1986).*

n25 These instances have thus far been limited to "when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or [criminally] prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-154, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980).*

n26 The court stated, "The Court finds that it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal jurisdiction over the specially appearing State defendants." Plaintiffs concede (# 33, P.13) that this issue was not exhausted in the tribal court.

n27 This court expresses no opinion as to whether it would have jurisdiction to review a tribal court determination of that issue. *National Farmers* and *Iowa Mutual* both contemplate some post-exhaustion review; however, the breadth of that review is as yet undefined. While National Farmers's almost casual reference to "review on the merits" suggests that a tribal court's resolution of the underlying claims is subject to federal review, dicta in *Iowa Mutual* proposes that after tribal court resolution of the merits, the parties

ill be collaterally estopped from relitigating, in federal court, the legal issues in the underlying claims. *See* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction, 73 N.C. L.Rev. 1089, 1119 (1995); Iowa Mutual v. LaPlante, 480 U.S. 9, 19, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987); National Farmers Union v. Crow Tribe, 471 U.S. 845, 856, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985).*

Of course, the court is, in this decision, engaging in the *de novo* review of the tribal co rt's jurisdictional ruling clearly required by *National Farmers* and *Iowa Mutual*. However, the court notes hat those two opinions seem to represent contradictory approaches to the question of post-exhaustion federal review of the substantive legal issues going to the merits of the underlying litigation.

n28 *But see Iowa Mutual, 480 U.S. 9, 16 n.8, 94 L. Ed. 2d 10, 107 S. Ct. 971* ("Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.")

n29 The amended complaints, at # 37 and # 38 in the official Record, as modified by stipulation of the parties, are currently the operative complaints in the underlying tribal court actions, CV-FT-91-034 and CV-FT-91-031. Molini is a named defendant in CV-FT-91-034.

APPENDIX C

IN THE WESTERN NEVADA INTER-TRIBAL COURT
OF APPEALS

FLOYD HICKS,

Appellant,

vs.

REBECCA HAROLD, et al.

Respondent. /

No. CV-FT-91-034
No. CV-FT-92-031

Appeal from an order quashing service of process upon State Defendants. Fallon Paiute-Shoshone Tribal Court, Stillwater, Nevada; Joseph Van Walraven, Associate Judge.

Reversed and Remanded

Ronald E. Johnny, for Appellant.

C. Wayne Howle, Deputy Attorney General.

Richard E. Olson, Jr., Tribal Prosecutor,

for Respondent

OPINION

BY JUDGE C. Stephen Rowley: Findings of Fact.

The court makes the following findings of fact: That the plaintiff Floyd Hicks (Hicks) appeals an order quashing service of process upon the State Defendants, preventing the State Defendants in their individual and official capacities from being sued in the Fallon Paiute-Shoshone Tribal Court (Fallon Tribal Court).

That in 1986, the Business Council of the Fallon Paiute-Shoshone Tribes (Tribe) enacted a Law & Order Code which, among many other provisions, required:

1) That Fallon Tribal Court take jurisdiction over all civil causes of action, over persons and things, arising or existing

within the territorial jurisdiction of the court (Title 1, §1-20-020(b)).

2) That the act of entry upon the territory within the jurisdiction of the Fallon Tribal Court shall conclusively be deemed consent to the jurisdiction of the Fallon Tribal Court with respect to any civil action arising out of such entry (Title 1, §1-20-020(b)).

3) That before any state official could conduct a search or make an arrest pursuant to a state court warrant on the Fallon Indian Reservation or Colony that there had to be a reciprocal agreement allowing the Tribe to officially serve its warrants off the reservation and colony (Title 1, §4-40-060(f)) and there had to be a felony investigation (Title 1, §4-04-060(c)).

4) That before a state official could conduct a search and seizure, a Tribal Search Warrant, the form described in detail by tribal law, must be issued by a judge of the court (Title 1, §4-40-010), 4-40-030(a)).

5) That before any evidence of criminal activity that took place off the reservation could be removed from the reservation by state officials there had to be a dispositional hearing (Title 1, §4-40-040).

6) That the Nevada Rules of Civil Procedure and general Civil Laws of the State of Nevada were to be used by the judges of the Fallon Tribal Court, as they thought necessary, but "not so as to impede the administration of justice nor contravene the application of any tribal law or custom or federal law not to produce any absurd result nor impose any regulatory scheme or policy not contemplated by the tribe nor to interfere with the tribe's laws or policies on any subject on any subject regulated by the tribe." (Title 1, §1-30-040)

That in 1990 and 1991, State Defendants repeatedly, and voluntarily, availed themselves of the jurisdiction of the Fallon Paiute-Shoshone Tribal Court, after obtaining legal counsel from the Churchill County District Attorney, to seek permission to conduct a search of Hicks' allotted Indian lands and his residence on the Fallon Indian Reservation for evidence of the killing of the California subspecies of Big Horn Sheep, a gross misdemeanor under Nevada law.

That in 1990 and 1991, State Defendants repeatedly, and

voluntarily, entered the Fallon Indian Reservation, after obtaining what may be on valid search and seizure warrant from the Justice of the Peace, New River Township, Churchill County, Nevada.

In 1990 and 1991, all in contravention of tribal law, the chief judge of the Fallon Tribal Court repeated authorized the defendants to:

1) Enter the Plaintiff's allotted Indian lands and residence, respectively, for the purpose of seizing evidence of freshly killed Big Horn Sheep of the California subspecies;

2) Seize the Plaintiff's aged mounted heads of the Rocky Mountain subspecies of Big Horn Sheep; and

3) Remove the Plaintiff's mounted heads from the exterior boundaries of the Fallon Indian Reservation and Colony without the required dispositional hearing.

There was and is no reciprocal agreement or Tribal-State Compact regarding the honoring of each jurisdiction's warrants and this was not a felony investigation.

During the December 4, 1991, Status Conference Hearing Judge Van Walraven defined what "guide" meant in Title 1, §1-30-040 and adopted and applied NRCP Rule 11 to all parties, including State Defendants' legal counsel demonstrating what he meant by his definition of the ward "guide."

This is the second time the Fallon Tribal Court has issued an order quashing service of process upon State Defendants. The first order, which is not before us, was issued after the Fallon Tribal Court, under the direction of Tribal Defendant/Chief Judge Harold, had effected official service of process upon the State Defendants by use of Certified, U.S. Mail. At that point in time, no judge of the Fallon Tribal Court had issued an order authorizing extraterritorial service of process as permitted by tribal law. (Title 1, §1-30-040)

That on May 3, 1993 Judge Joseph Van Walraven issued an order "adopt[ing] an apply[ing] the Nevada Rules of Civil Procedure (NRCP), Rule 4, inclusive, for the remainder of th[e] case[s]" without modifying the language of NRCP Rule 4(f) and without limiting service to within the exterior boundaries of the Fallon Indian Reservation and Colony only.

NRCP Rule 4(f) states, in part:

Territorial Limits of Effective Service. All process

... may be served anywhere within the territorial limits of the State [of Nevada] and, when a statute or rule so provides, beyond the territorial limits of the State. (Emphasis added.)

That on February 25, 1993, Judge Joseph Van Walraven adopted and applied NRCP Rules "26-37, inclusive, for the remainder of th[e] case[s]."

That on July 22, 1993, Chief Judge Harold, one of the named defendants in these cases, and Judge Van Walraven, enacted Title 2A of the Fallon Law & Order Code, governing "Jury Trials Procedures." Title 2A was imposed on the Plaintiff and State Defendants during their jury trial.

That in August 1993, the idigent [sic] Plaintiff at his own personal expense, and in reliance on Judge Van Walraven's May 3, 1993 order adopting and applying NRCP Rule 4(f), effected private service of process upon the State Defendants by publication in the Reno Gazette-Journal. (See Affidavit of Lisa A. Wakayama (August 25, 1993)).

That on February 1, 1994, Judge Joseph Van Walraven issued a written order quashing Plaintiff's August 1993 service of process upon the State Defendants by private means on the basis that he found "no method for extraterritorial service of the summons and complaint beyond the boundaries of the Fallon Paiute-Shoshone Tribes and [that] the court further [found] that there is no 'long-arm' statute or ordinance in effect on the Fallon Paiute-Shoshone Tribes." (Order Quashing Service Of Process As To Specially Appearing State Defendants at 1, lines 21-25).

Conclusions of Law

Plaintiff asserts that the Fallon Tribal Court neither correctly applied the relevant law nor was the court's decision of fact supported by substantial evidence. (These are the sole grounds for appeal by tribal law. See Title 1, Fallon Paiute-Shoshone Law & Order Code Title 1, §1-90-030(a), (b)). We conclude not only the Hicks effected a valid form of private service of process upon the State Defendants, but because of three reasons the State Defendants are properly before the Fallon Tribal Court for suit. First, the State Defendants acts of repeated voluntary entry onto the Fallon Indian Reservation and the Plaintiff's allotted Indian lands; Second, State Defendants repeatedly availing themselves,

voluntarily, of the jurisdiction of the Fallon Tribal Court that State Defendants; and, Third, the declaration of tribal law that the act of entry upon the Fallon Indian Reservation and Colony "shall conclusively be deemed consent to the jurisdiction" of the Fallon Tribal Court. We therefore remand to the Fallon Tribal Court to immediately set a trial date and allow the Plaintiff's civil jury trials to be heard without further delay consistent with this opinion.

We start our discussion with the advisement of Felix S. Cohen:

> Indian law is an extraordinary rich and diverse field. The cases, both old and new, weave a fabric with threads drawn from constitutional law, international law, federal jurisdiction, conflict of laws, real property, contracts, corporation, torts, domestic relations, procedure, trust law, intergovernmental relations, sovereign immunity, and taxation. Typically, as those fields meld into Indian law, the blend produces a new variation the could not have been predicted by analysis of the applicable law from those other fields. (Handbook of Federal Indian Law (Michie Pub. Co., 1982), the most recognized treatise on Indian law.)

It is not enough that a judge of a tribal court merely looks to state law for the answers to the issue presented. Indian law analysis which includes a review of custom, tradition and tribal common law, requires more. It does not affect the jurisdiction of this court that State Defendants' counsel admits that he lacks any knowledge of the customs, tradition and common law of the Fallon Tribes or the Northern Paiute and Western Shoshone Nations.

The holdings and interpretations of procedure by Nevada and other state courts identified by State Defendants, while supporting this court's decision, are not controlling on the Fallon Tribal Court or this court because when NRCP Rule 4(f) is melded into Title 1, §1-30-040, the blend produces a different result. (See State Defendants' Points and Authorities In Support Of Renewed Motion To Quash Service Of Process at 4, lines 4-19, citing Crummer v. Fourth Jud. Dist., 69 Nev. 276, 283, 249 P.2d 226 91952); Lain v. John Hancock Mut. Life Ins., 398 N.E.2d 278

(Ill.App.1979); Hunguenor v. Hunguenor, 420 So.2d 344 (Fla.App.1982); Braley v. Horton, 432 So.2d 463 (Ala.1983)).

Contrary to the opinion of the tribal court and the State Defendants, there is no need for the separate "long-arm" statute for extraterritorial service of process and one [sic] Judge Van Walraven issued a rule providing for extra territorial service of process by the methods approved by NRCP Rule 4(f), service in accordance with such rule of the court is valid.

Judge Van Walraven's authority to approve and apply Indian law is demonstrated by his adopted of NRCP Rules 4, inclusive, 11, inclusive 26-37, inclusive, NRS 49.335 et seq., and Title 2A of the Law & Order code, and he is stopped from denying such authority after the indigent Plaintiff has observed repeated demonstration of such authority and relied upon Judge Van Walraven's actions. (Judge Van Walraven's act of ordering the adoption and application of these provisions of NRS clearly demonstrate his broad authority from the Business Council).

The fact that the Fallon Business Council has not acted to reverse Judge Van Walraven's orders adopting and apply NRCP Rules 4, 11, 26-37, NRS 49.335 et seq., and Title 2A of their Law & Order Code demonstrates that he acts with the approval of the tribe's Legislature and governing body, thus Judge Van Walraven has not usurped the choices of the Fallon Business Council as suggested by State Defendants.

As well, Judge Van Walraven's order amending his May 3, 1993, adoption and application of NRCP Rule 4, inclusive, fails under tribal law (Title 1, §1-30-040) because it:

1) Emasculates the Fallon Tribal Court and renders it useless to reservation residents; impedes the administration of justice,

2) Contravenes the application of tribal law;

3) Contravenes the application of tribal custom,

4) Contravenes the application of federal laws, produces an absurd result, and

5) Interfere's [sic] with the tribe's laws declaring jurisdiction in these very types of civil matters.

Given the declaration of tribal law, that the "act of entry upon the territory within the jurisdiction of the court shall

conclusively be deemed consent to the jurisdiction of the [Fallon Tribal Court] with respect to any civil action arising out of such entry," the Plaintiff did not need tribal law authorization to effect notice of suit outside the exterior boundaries of the Fallon Indian Reservation. Plaintiff could have merely mailed notice of suit to the State Defendants since their act of entry is conclusively deemed as consent to suit.

With regard to State Defendants' argument that as mere Nevada game wardens they lacked authority to subject the State of Nevada to suit in tribal court or that they lacked authority to consent to suit by the act of their entry on the Fallon Indian Reservation, State Defendants ignore the fact that sought legal counsel from the Churchill County District Attorney before repeatedly entering the Fallon Indian Reservation and the Plaintiff's allotted Indian lands voluntarily.

If a judgment is entered against the State Defendants following trial, they have the right to contribution by a number of persons, including the Churchill County District Attorney. Moreover, the August 1990 Search and Seizure Warrant issued by Justice of the Peace Marilyn Craig clearly on its fact advised State Defendants that they were entering a jurisdiction in which Nevada law did not apply.

State Defendants would do well to recognize that they have not only been sued in their official capacity, but their individual capacity as well.

Moreover, State Defendants' argument appears only to be an extension of their unsuccessful argument in Hall v. Nevada (8 Cal.3d 522, 105 Cal.Rptr. 355, 503 P.2d 1363, 1365-1366 (1972)), and Nevada v. Hall (440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416, reh. denied, 441 U.S. 917 (1979)). For the same reasons that California's courts exist to protect their citizens so do tribal courts. (See Hall v. Nevada, 8 Cal.3d 522, 105 Cal.Rptr. 355, 503 P.2d 1365 (1972) (citing People v. Streeper, 12 Ill.2d 204, 145 N.E.2d 625, 629 91957) for the proposition that the sovereignty of one jurisdiction does not extend into the territory of another so as to create immunity from suite)).

With regard to State Defendants' objection to the method of private service given the practicalities and peculiarities of these cases. The State Defendants were given notice and it was effective

because they appeared to contest the service. That is all that is required of by federal law. See Mulane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), where the Court held:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must afford a reasonable time for those interested to make their appearance . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. . . ."

339 U.S., at 314-315.

Order

This matter is therefore Ordered by this Court to be reversed & remand for full consideration with regards to all of the above findings of fact & conclusions of law.

Reversed and Remanded.

FILED: May 13, 1994.

BY: Clarence B. McDade, Chief Appellate Judge
_____, Appellate Judge
(unreadable)

I concur in the result of the majority opinion.

BY: Charles R. Hostnik, Appellate Judge

APPENDIX D

NOT FOR PUBLICATION
UNITES STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF NEVADA; WILLIAM MOLINI, NEVADA DIVISION OF WILDLIFE; and MICHAEL C. SPENCER, RICH ELLINGTON and BILL FITZMORRIS,
Plaintiffs-Appellants,

vs.

FLOYD HICKS; TRIBAL COURT in and for THE PAIUTE-SHOSHONE TRIBES; HONORABLE JOSEPH VAN WALRAVEN,
Defendants-Appellees, /

NO. 96-17315

D.C. No. CV-94-00351-DWH

ORDER

Before: GOODWIN, B. FLETCHER and RYMER, Circuit Judges

Judges Goodwin and B. Fletcher voted to deny the petition for rehearing and recommended rejection of the petition for rehearing en banc. Judge Rymer voted to grant the petition for rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

FILED: MARCH 9, 2000.

APPENDIX E

CASE NO. 90-02065

IN THE JUSTICE'S COURT OF THE NEW RIVER TOWNSHIP
COUNTY OF CHURCHILL, STATE OF NEVADA

IN THE MATTER OF THE
APPLICATION FOR A SEARCH WARRANT. AFFIDAVIT

_____/

STATE OF NEVADA)
: ss.
COUNTY OF CHURCHILL)

MIKE SPENCER, being first duly sworn according to law, deposes and says:

1) That I am a Game Warden for the Nevada Department of Wildlife and have been so employed for approximately five (5) years.

2) That in that capacity, I have been, for about a year and a half, investigating the possible crime of Possessing or Killing a Big Horn Sheep, a Gross Misdemeanor, in violation of N.R.S. 501.376, involving FLOYD HICKS.

3) That with the aid of a Confidential Informant, who has provided reliable information in the past resulting in convictions, certain information, and have made personal observations which corroborates said information.

4) That on or about January of 1989, Confidential Informant advised me that in June of 1988 he observed two (2) dead big horn sheep in the back of a pickup truck owned by FLOYD HICKS.

5) That Confidential Informant further advised me that the two (2) dead sheep appeared to have been dead for less than twenty four (24) hours.

6) That Confidential Informant further advised me that suspect, FLOYD HICKS, admitted to possessing said sheep and was planning on taking same to a taxidermist in Fallon, Nevada.

7) That later, on or about August 30, 1990, at about 1:00 o'clock p.m., I was advised by special agent James W. Rogers of the U.S. Department of Interior – Bureau of Land Management that on August 29, 1990, he observed one big horn sheep head protruding from an open trunk of a vehicle located on FLOYD HICKS' premises, at 7755 Stillwater Road, Fallon, Nevada.

8) That Mr. Rogers advised me that on said date of said observation he and his investigative aid, George High of the Bureau of Land Management, were on FLOYD HICKS' property at 7755 Stillwater Road, Fallon, Nevada, for the purpose of conducting an unrelated investigation.

9) That based on the information above, I personally observed, from Stillwater Road, a big horn sheep head with horns protruding from the trunk of a vehicle located on FLOYD HICKS' property at 7755 Stillwater Road, Fallon, Nevada.

10) That your affiant is informed and believes that since 1982, no person with the surname of HICKS, of Fallon, Churchill County, Nevada has obtained a proper big horn sheep tag from the Nevada Department of Wildlife.

WHEREFORE, affiant prays that a Search Warrant be issued directing the search of the premises and property located at 7755 Stillwater Road, Fallon, Churchill County, Nevada, for the purpose of seizing any big horn sheep heads and/or evidence of possession, ownership or control of same and that said search to be made between the hours of 7:00 o'clock a.m. and 7:00 o'clock p.m.

DATED: August 30, 1990.

BY: Michael Spencer, Game Warden
Nevada Department of Wildlife

SUBCRIBED and SWORN to before me
this 30th day of August, 1990.
Lena McQueen, Notary Public
My appointment expires Dec. 6, 1993.

APPENDIX F

IN THE FALLON PAIUTE-SHOSHONE TRIBAL COURT

IN THE MATTER OF THE APPLICATION FOR A SEARCH AND SEIZURE WARRANT. /	ORDER APPROVING AND AUTHORIZING EXECUTION OF SEARCH WARRNT ON TRIBAL RESERVATION

The within affidavit and search warrant having been reviewed by the Court, and probable cause appearing, and good cause therefore;

IT IS HEREBY ORDERED that the search warrant is approved (as modified below) and execution of said warrant is authorized for the premises of FLOYD HICKS, 7755 Stillwater Road, Churchill County, Nevada, located within the exterior boundary of the Fallon Paiute-Shoshone Indian Reservation.

Modified as follows: N/A.

DATED: June 13, 1991

BY: Rebecca Ann Harold
Tribal Court Judge

ATTACHMENT TO ABOVE ORDER (APP. F):

IN THE JUSTICE'S COURT OF THE NEW RIVER TOWNSHIP
COUNTY OF CHURCHILL, STATE OF NEVADA

CASE NO. 91-01248

IN THE MATTER OF THE	
APPLICATION FOR A SEARCH	SEARCH AND
AND SEIZURE WARRANT. /	SEIZURE WARRANT

THE STATE OF NEVADA TO:

ANY PEACE OFFICER IN THE COUNTY
OF CHURCHILL, STATE OF NEVADA

Proof by Affidavit having been made this date before me by Game Warden MICHAEL C. SPENCER of the Nevada Department of Wildlife, that there is probable cause to believe that the crime of: POSSESSING OR KILLING A BIG HORN SHEEP, in violation of N.R.S. 501.376, a Gross Misdemeanor has been committed, and that evidence of said crime, to wit: two (2) mounted big horn sheep heads, is believed to be located at the residence at 7755 Stillwater Road, Fallon, Churchill County, Nevada;

YOU ARE HEREBY COMMANDED, to search for and seize said mounted big horn sheep heads, at the property and premises of FLOYD HICKS, 7755 Stillwater Road, Churchill County, Nevada. Said service of said warrant to be made between the hours of 7:00 o'clock a.m. and 7:00 o'clock p.m., with return of said warrant to be made to the above-entitled court.

DATED: June 12, 1991.

BY: Daniel P. Ward, Justice of the Peace
New River Township

ATTACHMENT TO ABOVE ORDER (APP. F):

CASE NO. 91-01248

IN THE JUSTICE'S COURT OF THE NEW RIVER TOWNSHIP
COUNTY OF CHURCHILL, STATE OF NEVADA

IN THE MATTER OF THE
APPLICATION FOR A SEARCH AND SEIZURE WARRANT. /

AFFIDAVIT

STATE OF NEVADA)
: ss.
COUNTY OF CHURCHILL)

I, MIKE SPENCER, being first duly sworn, according to law, deposes and says:

1) That I am a Game Warden for the Nevada Department of Wildlife and have been so employed for approximately five and one half years.

2) That in that capacity, I have been, for about two and one half years, investigating the possible crime of Possessing or Killing a Big Horn Sheep, a Gross Misdemeanor, in violation of N.R.S. 501.376, involving FLOYD HICKS.

3) I have received information from a Confidential Informant, who has provided reliable information in the past, resulting in convictions.

4) That on or about January of 1989, Confidential Informant advised me that in June of 1988 he observed two (2) dead big horn sheep in the back of a pickup truck owned by FLOYD HICKS, within Churchill County, Nevada.

5) That Confidential Informant further advised me that the two (2) dead sheep appeared to have been recently killed, with fresh, liquid blood still evident.

6) That Confidential Informant further advised me that suspect, FLOYD HICKS, admitted to possession of said sheep

and was planning on taking same to a taxidermist in Fallon, Nevada.

7) That later, on or about June 1, 1991, at about 11:00 o'clock a.m., I was advised by Officer Robert Wise of the Fallon Paiute-Shoshone Tribal Police Department, that on June 8, 1991, he observed two mounted big horn sheep ram heads in a bedroom in the house located on FLOYD HICKS' premises, at 7755 Stillwater Road, Churchill County, Nevada.

8) That Mr. Wise advised me that on said date of said observation, he was on FLOYD HICKS' property at 7755 Stillwater Road, Churchill County, Nevada, for the purpose of conducting an unrelated investigation.

9) The observations of Wise independently corroborate the information supplied by the Confidential Informant.

10) That your affiant is informed and believes that since 1982, no person with the surname of HICKS, of Fallon, Churchill County, Nevada has obtained a proper big horn sheep tag from the Nevada Department of Wildlife.

WHEREFORE, affiant prays that a Search Warrant be issued directing the search of the premises and property located at 7755 Stillwater Road, Fallon, Churchill County, Nevada, for the purpose of seizing any big horn sheep heads and that said search to be made between the hours of 7:00 o'clock a.m. and 7:00 o'clock p.m.

DATED: June 12, 1991.

BY: Michael C. Spencer, Game Warden
Nevada Department of Wildlife

SUBCRIBED and SWORN to before me
this 12th day of June, 1991.
Daniel P. Ward, Justice of the Peace
New River Township, Churchill County, Nevada

APPENDIX G

IN THE JUSTICE'S COURT OF THE NEW RIVER TOWNSHIP
COUNTY OF CHURCHILL, STATE OF NEVADA

SEARCH WARRANT

THE STATE OF NEVADA TO:

ANY PEACE OFFICER IN THE COUNTY
OF CHURCHILL, STATE OF NEVADA

Proof by Affidavit having been made before me this day by GAME WARDEN MIKE SPENCER, of the Nevada Department of Wildlife that there is probable cause to believe that big horn sheep heads or evidence of same, is located at 7755 Stillwater Road, Fallon, Churchill County, Nevada:

YOU ARE HEREBY COMMANDED, SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES, to search the said premises located at 7755 Stillwater Road, Fallon, Churchill County, Nevada, for any big horn sheep heads or evidence of same, said search to be made between the hours of 7:00 o'clock a.m. and 7:00 o'clock p.m.

This Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes of Fallon, Churchill County, Nevada.

Dated: August 30, 1990.

M.D. Craig, Judge, New River Township

APPROVED and amended – applies to exterior premises only and to vehicles thereon; may be exercised 7:00 a.m. through 8:00 p.m.

Rebecca Ann Harold, Tribal Court Judge

APPENDIX H

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES
CHURCHILL COUNTY, NEVADA

FLOYD HICKS
Plaintiff,

vs.

Tribal Judge REBECCA HAROLD; STATE OF NEVADA; Director, Nevada Department of Wildlife, WILLIAM MOLINI; Nevada State Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS and their CONFIDENTIAL INFORMANT; Tribal Police Officers BOB WISE and BOB MINTON; and JOHN DOES I Thru X, and REBECCA HAROLD, WILLIAM MOLINI, MICHAEL C. SPENCER, RICK ELLINGTON, BILL FITZMORRIS, CONFIDENTIAL INFORMANT, BOB WISE, BOB MINTON, and JOHN DOES I thru X, individually.

Defendants. /

CASE NO. CV-FT-91-034

COMPLAINT

NOW COMES the Plaintiff, FLOYD HICKS, through his legal counsel of record, RONALD E. JOHNNY, who states and affirms as follows:

1. That the Plaintiff is an Indian and enrolled member of the Fallon Paiute-Shoshone Tribes and a dual resident of the Fallon Indian Reservation and Churchill Count, State of Nevada.[1]

2. That the residence of the Plaintiff is 7755 Stillwater Road, Fallon, Churchill County, Nevada, but within the exterior boundaries of the Fallon Paiute-Shoshone Indian Reservation and outside the civil and criminal jurisdiction of state officials with

regard to the Plaintiff[2] and his property except as provided by federal law and perhaps tribal law.[3]

3. That all Defendants, except perhaps the CONFIDENTIAL INFORMANT of Nevada Game Warden SPENCER, are non-Indians but subject to the civil jurisdiction of this court in accordance with federal law, a decision of the United States Supreme Court[4] and tribal law.[5]

4. That tribal court judges and tribal police officers are not immune from civil damages under trial law if "malicious intent" or "bad faith" can be shown to be present in their deliveratios and/or actions.[6]

I.

Denial of Equal Protection Under the ICRA

5. That the Indian Civil Rights Act[7] (hereinafter "ICRA"), enacted by Congress in 1968, states, in pertinent part:

> "No Indian tribe in exercising powers of self-government shall—
>
> * * *
>
> "(8) deny to any person within its jurisdiction the equal protection of its laws...."

See also Cohen, supra, at 667.

6. That on June 13, 1991, Tribal Court Judge REBECCA HAROLD[8] issued a document entitled "ORDER APPROVING AND AUTHORIZING EXECUTION OF SEARCH WARRANT ON TRIBAL RESERVATION." See Plaintiff's Exhibit No. 1.

7. That the document, identified-above, issued by Tribal Court Judge HAROLD was done without any legal basis and in clear and utter disregard for tribal law.[9]

8. Given the legal education and legal experience of Tribal Court Judge REBECCA HAROLD such disregard of tribal law is evidence of malicious intent or bad faith.

9. That on June 13, 1991, Fallon Tribal Police Officer BOB MINTON and persons identifying themselves as Game Wardens, Nevada Department of Wildlife, MICHAEL C. SPENCER, BILL FITZMORRIS and RICK ELLINGTON, entered the allotted individual Indian land[10] of the Plaintiff on the Fallon Paiute-Shoshone Indian Reservation without the Plaintiff's permission and

ordered the Plaintiff to submit to the search of his home.

10. Game Warden MICHAEL C. SPENCER showed the Plaintiff, but did not give him, a copy of a Search and Seizure Warrant issued by DANIEL P. WARD, Justice of the Peace, New River Township, Churchill County, State of Nevada, dated June 12, 1991. See Plaintiff's Exhibit No. 2.

11. That the Plaintiff is a long-time former tribal police officer with the Fallon Paiute-Shoshone Tribes with many years of honorable service.

12. Based upon the Plaintiff's tribal police experience and knowledge of tribal law, the Plaintiff demanded knowledge from Game Warden SPECNER[11] as to whether or not the Game Wardens of the Nevada Department of Wildlife, to-wit: SPENCER, FITZMORRIS and ELLINGTON, had a search warrant issued from a judge of the Tribal Court of the Fallon Paiute-Shoshone Tribes, in accordance with tribal law, and legal authority to be on his property.

13. That Game Warden SPENCER told the Plaintiff that they (meaning all Nevada state Game Wardens) had a valid search warrant from a tribal judge but he refused to show it to the Plaintiff or give him a copy.[12]

14. That given the fact that Tribal Police Officer BOB MINTON was prepared to arrest the Plaintiff if he refused to allow Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON to enter his home and conduct the search of his home, the Plaintiff unwillingly allowed Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON to invade his home.

15. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON entered the Plaintiff's residence on the Fallon Indian Reservation.

16. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON entered the Plaintiff's residence on the Fallon Indian Reservation under color of an state court Search and Seizure Warrant they knew to be invalid.[13]

17. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON entered the Plaintiff's residence on the Fallon Indian Reservation under color of an tribal document issued by

Tribal Court Judge REBECCA HAROLD they knew was not authorized by tribal law.[14]

18. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON searched the Plaintiff's residence on the Fallon Indian Reservation.

19. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON secured and took from the Plaintiff's residence a Big Horn sheep head, that is approximately 40-45 years old, that they sought in accordance with the Search and Seizure Warrant of Justice of the Peace WARD and the tribal document issued by Tribal Court Judge REBECCA HAROLD.

20. That Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON took personal property of the Plaintiff from his home, to-wit: an aged head of a Big Horn sheep unlawfully and in violation of the Indian Civil Rights Act equal protection clause.

II.

Unreasonable Search and Seizure under the ICRA

21. The Plaintiff incorporates paragraphs numbers 1 thru 20 in this cause of action.

22. That the Indian Civil Rights act, supra, states, in pertinent part:

> "No Indian tribe in exercising powers of self-government shall—
>
> * * *
>
> "(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." (Emphasis added.)

See also Cohen, supra, at 666.

23. That no person went before Tribal Court Judge REBECCA HAROLD with an application for a tribal search warrant.

24. That no person went before Tribal Court Judge REBECCA HAROLD with an application for a tribal search warrant support by oath or affirmation.[15]

25. That no person went before Tribal Court Judge REBECCA HAROLD with an application for a tribal search warrant particularly identifying what part of the Plaintiff's premises were to be search.[16]

26. That Tribal Court Judge REBECCA HAROLD failed to issue a tribal search warrant authorizing Tribal Police Officer BOB MINTON and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON and BILL FITZMORRIS to enter the private property of the Plaintiff.

27. That Tribal Court Judge REBECCA HAROLD failed to issue a tribal search warrant authorizing Tribal Police Officer BOB MINTON and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON and BILL FITZMORRIS to enter and search a particular part of the Plaintiff's premises.

28. Tribal Court Judge REBECCA HAROLD violated the search and seizure clause of the Indian Civil Rights Act and such act constitutes malicious intent or bad faith given her legal education and experience.

III.

Unreasonable Search and Seizure under Tribal Law

29. The Plaintiff hereby incorporates paragraphs number 1 thru 28 for this cause of action.

30. That tribal law[17] specifically sets for the mandatory requirements prior to a tribal judge being able to issue a tribal search warrant in cases where non-tribal authorities seek a search warrant. See Title 4, Fallon Tribal Code, §4-40-060 et seq.

31. Before a judge of the Fallon Indian court may issue a search warrant for an off reservation non-Indian jurisdiction crime a felony crime or felony investigation must be involved. See Title 4, Fallon Tribes Law and Order Code §4-40-060(d).

32. There was no probable cause to believe that the Plaintiff had committed a felony off the reservation in the State of Nevada. See Affidavit of MICHAEL C. SPENCER to Justice of the Peace WARD, page 1, lines 19-22 ("Gross Misdemeanor"); Plaintiff's Exhibit No. 3. See also Search and Seizure Warrant of Justice of the Peace WARD, page 1, line 14-21 ("Gross Misdemeanor").

33. Tribal law requires that before a tribal search warrant may be issued in felony cases that the State of Nevada must have a

signed agreement with tribal authorities allowing tribal warrants to be served in an identical manner. See Title 4, Fallon Tribes Law and Order Code, §4-40-060(f).

34. There is no signed agreement between the State of Nevada and the Fallon Tribes to reciprocate as to search warrants.

35. That Tribal Court Judge REBECCA HAROLD's issuance of the document entitled "ORDER APPROVING AND AUTHORIZING EXECUTION OF SEARCH WARRANT ON TRIBAL RESERVATION is not only not authorized by tribal law but is also either evidence of malicious intent or bad faith, given her legal education and experience.

IV.

Denial of Due Process under ICRA

36. The Plaintiff hereby incorporates paragraphs numbered 1 through 35 in this cause of action.

37. That the ICRA, supra, states, in pertinent part:

> "No Indian tribe in exercising powers of self-government shall--
>
> * * *
>
> "(8) deny to any person within its jurisdiction . . . liberty or property without due process of law;"

See also Cohen, supra, at 667.

38. The use of an invalid process to bootstrap the tainted Search and Seizure Warrant of Justice of the Peace WARD into a valid tribal order denied the Plaintiff due process under the ICRA.

39. Given the length of time the Plaintiff has been in possession of the item sought by Nevada Game Warden SPENCER,[18] it was a denial of due process for Tribal Court Judge REBECCA HAROLD not to initiate a lawful process whereby the Big Horn sheep head was seized, if possible under tribal law, and a hearing held to determine whether Nevada Game Warden SPENCER had a legal right to secure same under tribal law since no felony was being investigated.

V.

Trespass to Land

40. The Plaintiff incorporated paragraphs numbered 1 thru 30 in this cause of action.

41. Tribal Court Judge REBECCA HAROLD, in concert with Tribal Police Officer BOB MINTON and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON and BILL FITZMORRIS, by issuing an invalid tribal document, [19] participated in and did unlawfully enter the Plaintiff's allotted Indian lands (property)[20] – a trespass.

42. Tribal Court Judge REBECCA HAROLD, in concert with Tribal Police Officer BOB MINTON and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON and BILL FITZMORRIS, by issuing an invalid tribal document, participated in and did unlawfully enter the Plaintiff's residence – a trespass. See Citations at Footnote 19 and 20.

43. That such Trespass to Land is evidence of malicious intent or bad faith on the part of Judge HAROLD, Tribal Police Officer MINTON and Nevada Game Wardens SPENCER, ELLINGTON and FITZMORRIS.

VI.

Trespass to Chattels

44. The Plaintiff hereby incorporates paragraphs number 1 thru 43 in this cause of action.

45. That without legal authority, Tribal Court Judge REBECCA HAROLD ordered, and Tribal Police Officer BOB MINTON and Nevada Game Wardens SPENCER, ELLINGTON, and FITZMORRIS unlawfully took the property of the Plaintiff, to-wit: one Big Horn sheep head, from the sanctity of the Plaintiff's residence.

46. That such action of the Defendants HAROLD, MINTON, SPENCER, ELLINGTON and FITZMORRIS constitutes a trespass to chattels.[21]

47. That such action of the Defendants HAROLD, MINTON, SPENCER, ELLINGTON and FITZMORRIS is evidence of a malicious intent or bad faith.

VII.

Wrongful Civil Proceedings

48. The Plaintiff hereby incorporates paragraphs numbered 1 thru 47 in this cause of action.

49. That the Defendants HAROLD, MINTON, FITZMORRIS, ELLINGTON and SPENCER either initiated or participated in a

quasi-civil process which caused an interference with the Plaintiff's property and caused him to expend time, energy and money in preventing the lawful search of his premises under an invalid warrant.

50. A scientific review of the Big Horn sheep head by the Nevada Department of Wildlife has determined that the head is much older than that reported by the Nevada Game Warden SPENCER's Confidential Informant.

51. That the action complained of in paragraph number 49 constitutes the tort of wrongful civil proceedings.[22]

52. That the action of the above-named defendants, in paragraph number 49, is evidence of malicious intent and/or bad faith.

VIII.

Abuse of Process

53. The Plaintiff hereby incorporates paragraphs numbered 1 thru 52 in this cause of action.

54. That Defendants HAROLD, MINTON, WISE, SPENCER, FITZMORRIS and ELLINGTON used an improper process to secure possession of the Plaintiff's property which Defendants SPENCER, FITZMORRIS and ELLINGTON could not otherwise secure because the process used violated the strict requirements of tribal law.

55. The action of the Defendants HAROLD, MINTON, WISE, SPENCER, FITZMORRIS and ELLINGTON constitute the tort of Abuse of Process.[23]

IX.

Infliction of Mental Distress

56. The Plaintiff hereby incorporates paragraphs numbered 1 thru in this cause of action.

57. The acts of the Defendant HAROLD in knowingly issuing an invalid order of the court strictly violates tribal law and exceeds all bounds usually tolerated by decent society and is especially of a nature calculated to cause mental distress.[24]

58. The actions of the Defendants MINTON, WISE, SPENCER, ELLINGTON and FITZMORRIS was emotionally

explosive to a law abiding person such as the Plaintiff and extremely outrageous to the reasonable person.

59. That the action of Tribal Court Judge REBECCA HAROLD, Tribal Police Officers BOB WISE and BOB MINTON, and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS, and their CONFIDENTIAL INFORMANT, have cause the Plaintiff to be the subject of much insult, indignity, joking, shame and ridicule in his community.

60. That the action of Tribal Court Judge REBECCA HAROLD, Tribal Police Officers BOB WISE and BOB MINTON, and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS, and their CONFIDENTIAL INFORMANT, have cause the Plaintiff to suffer sleepless nights, loose weight, have bad dreams, suffer health problems, consider suicide, and have cause him to seek professional medical help.

61. That the actions of Tribal Court Judge REBECCA HAROLD, Tribal Police Officers BOB WISE and BOB MINTON, and Nevada Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS, and their CONFIDENTIAL INFORMANT, have cause the Plaintiff to suffer from emotional distress.

62. That the extremely outrageous conduct of Defendant HAROLD is evidence of malicious intent or bad faith.

63. That the effect of the extremely outrageous conduct by Defendants WISE, MINTON, ELLINGTON, FTIZMORRIS and ELLINGTON is evidence of malicious intent or bad faith.

WHEREFORE THE PLAINTIFF prays the court:

1. For the first cause of action, denial of equal protection under the Indian Civil Rights Act, award the Plaintiff against the named Defendants the sum of $25,000.

2. For the second cause of action, unreasonable search and seizure under the Indian Civil Rights Act, award the Plaintiff against the named Defendants the sum of $25,000.

3. For the third cause of action, unreasonable search and seizure under tribal law, award the Plaintiff against the named Defendants the sum of $500,000.

4. For the fourth cause of action, denial of due process under the Indian Civil Rights Act, award the Plaintiff against the named Defendants the sum of $25,000.

5. For the fifth cause of action, trespass to land, award the Plaintiff against the named Defendants the sum of $25,000.

6. For the sixth cause of action, trespass to chattels, award the Plaintiff against the named Defendants the sum of $25,000.

7. For the seventh cause of action, wrongful civil proceedings, award the Plaintiff against the named Defendants the sum of $100,000.

8. For the eighth cause of action, abuse of process, award the Plaintiff against the named Defendants the sum of $250,000.

9. For the ninth cause of action, infliction of emotional distress, award the Plaintiff against the named Defendants the sum of $250,000 and an additional $1,000,000.00 in punitive damages.

10. Issue an mandatory injunction directing Tribal Court Judge REBECCA HAROLD to cease from departing from tribal law in the issuance of orders concerning search of Indian residences and seizure of Indian property by state officials.

11. Issue a declaratory judgment that the document issued by Tribal Court Judge REBECCA HAROLD, to-wit: "ORDER APPROVING AND AUTHORIZING EXECUTION OF SERCH WARRANT ON TRIBAL RESERVATION" is without any force or effect and against the dignity of the laws of the Fallon Paiute-Shoshone Tribes.

Respectfully submitted,
RONALD E. JOHNNY, J.D.
Legal Counsel for Plaintiff

CERTIFICATION

I, FLOYD HICKS, hereby state and affirms that I am the Plaintiff in the above-captioned action; that I have read the above Complaint; that I fully understand all statements made in the Complaint and that such statements are true to the best of my knowledge, information and belief.

FLOYD HICKS

Fallon Indian Reservation

SWORN and SUBSCRIBED to before me
this 8th day of July, 1991.
CARRIE SANTOS, Court Clerk
Tribal Court
Fallon Paiute-Shoshone Tribes

FOOTNOTES TO ABOVE COMPLAINT (APP. H)

1. See Felix S. Cohen, Handbook of Federal Indian Law (1982 ed., Michie co. Pub.) (hereinafter "Cohen") at 645-646.

2. See Cohen, supra, at 449. Since only the taking of land was compensated to Northern Paiutes by the United States and not hunting rights, for lands in the State of Nevada taken without a Treaty, the Plaintiff also believes that he may have hunting rights off the Fallon Tribes Indian Reservation within the State of Nevada based on his Northern Paiute ancestry. See Omer C. Stewart, The Northern Paiute Bands, Anthropological Records, Vol. 2, No. 3 (University of California Press, Berkeley, CA 1939) at 141. The Plaintiff, also of Shoshone ancestry, also believes that he has certain undefined hunting rights as a Shoshone Indian within the State of Nevada. See Tulee v. Washington, 315 U.S. 681 (1942); Puyallup I, 391 U.S. 392 (1968); Puyallup II, 414 U.S. 44 (1973). See also Cohen at 458-462.

3. Title 4, Fallon Tribes Law and Order Code §4-40-060 only allows judges of the Fallon Indian court to issue tribal search warrants when there is "probable cause to believe that a felony has occurred [off the reservation], over which the government requesting the search has jurisdiction...." There is no tribal law or other tribal authority that allowed Tribal Court Judge REBECCA HAROLD to issue the document she did, entitled "ORDER APPROVING AND AUTHORIZING EXECUTION OF SEARCH WARRANT ON TRIBAL RESERVATION," dated June 13, 1991, for an allegation of a Gross Misdemeanor within the State of Nevada as set forth in the Affidavit of Nevada Game Warden MICHAEL C. SPENCER, page 1, line 21, and the Search and Seizure Warrant of Justice of the Peace DANIEL P. WARD, page 1, line 18.

4. National Farmers Insurance Co. v. Crow Tribe of Indians, ___ U.S. ___, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).

5. Title 1, Fallon Tribes Law and Order Code, §1-20-020 (Civil Jurisdiction) states, in pertinent part:

> "(a) The Tribal Court shall have jurisdiction over all civil causes of action, over persons, arising or existing within the territorial jurisdiction of the court.

"(b) Personal jurisdiction shall exist over all persons who are Indians or who consent to the jurisdiction of the Tribal Court. The act of entry upon territory within the jurisdiction of the court shall conclusively be deemed consent to the jurisdiction of the court with respect to any civil action arising out of such entry."

* * *

(Emphasis added.)

6. See Title 1, Fallon Tribes Law and Order Code, §1-1-040 (Immunity of officials and employees) ("Any elected or appointed official or employee of the Fallon ... Tribe shall enjoy ... immunity from suit ... unless it is established that such action was taken with malicious intent or bad faith."). See also Title 4, Fallon Tribes Law and Order Code, §4-40-050(d) (Supplementary Remedies for Illegal Searches and Seizures).

7. Codified at, Title 25, United States Code, §1302.

8. A Nevada state licensed attorney who is also currently or immediately a past chief judge of the Court of Indian Offenses for the Lovelock Paiute Tribe and the chief judge of the Tribal Court for the Fort McDermitt Paiute-Shoshone Tribe, both of Nevada.

9. Title 4, Fallon Tribes Law and Order Code, §4-40-060(a), (c) only allows a tribal court judge to issue a "search warrant" if there is "probable cause to believe that a felony has occurred...." Nevada Game Warden SPENCER was only investigating a Gross Misdemeanor. See Affidavit of Justice of the Peace WARD, page 1, line 21. In addition, the technical requirements of a tribal search warrant, defined at §4-40-010 et seq. were not complied with by Tribal Court Judge HAROLD. There is no tribal law authority for the issuance of the document issued by Tribal Court Judge HAROLD.

10. Seen Cohen, supra, at 39-41.

11. Tribal Police Officer BOB MINTON was not the official who served the Nevada state search and seizure warrant from Justice of the Peace WARD or tribal document upon the Plaintiff as required by tribal law. Tribal police officer MINTON kept a reserve (behind the front lines) position during this entire ordeal.

12. that such refusal to show the tribal search warrant and give

a copy of it to the Plaintiff constitutes malicious intent or bad faith by Nevada Game Wardens SPENCER, FITZMORRIS and ELLINGTON and Tribal Police Officer BOB MINTON.

13. It is the opinion and belief of the Plaintiff that Nevada Game Warden MICHAEL C. SPENCER intentionally misled Justice of the Peace DANIEL P. WARD in obtaining the state Search and Seizure Warrant because the Affidavit of MICHAEL C. SPENCER, in support of the state Search and Seizure Warrant, did not identify that FLOYD HICKS was (1) an Indian and (2) that FLOYD HICKS lives on the Fallon Indian Reservation clearly outside the civil and criminal jurisdiction of the State of Nevada. See Affidavit of MICHAEL C. SPENCER, page 1 and 2, lines 22 and 11-13, 15-16, respectfully.

The Plaintiff also believes that MICHAEL C. SPENCER also misled Justice of the Peace WARD in that the observations of the confidential informant were on the Fallon Indian Reservation, where the possession of the Big Horn sheep head is not a violation of tribal law. See Affidavit of MICHAEL C. SPENCER, page 1 and 2, lines 26-28 and 2-4, 5-7, respectfully.

14. Only tribal search warrants for felonies committed off the reservation can be issued by a tribal court judge. See Title 4, Fallon Tribes Law and Order code, §4-40-060(c). The Nevada Game Wardens were investigating only a Gross Misdemeanor (since January of 1989) wherein it was suspected that FLOYD HICKS had killed off the Fallon Indian Reservation (but maybe on another Indian reservation) and possessed illegally (under state law) Big Horn sheep heads from June of 1988. See Affidavit of MICHAEL C. SPENCER to Justice of the Peace WARD, page 1, lines 26-28, dated June 12, 1991.

In addition, it has long been held that police officers cannot rely on bad warrants such as were Game Warden SPENCER misled Justice of the Peace WARD as to the race and residency of the Plaintiff and Tribal Court Judge HAROLD issued a document not authorized by tribal law, allowing SPENCER to serve the tainted state Search and Seizure Warrant. See Quinnette v. Garland, 277 F.Supp. 999 (DC CD Cal. 1967); this case remains good law and the award of nominal damages in that case is not applicable here.

15. In the opinion of the Plaintiff, Nevada Game Warden MICHAEL C. SPENCER intentionally misled Justice of the Peace

WARD as to the race and residency of the Plaintiff. It is entirely likely, given his knowledge of the law and his long time residence in the area, that Justice of the Peace WARD would have rejected issuing his Search and Seizure Warrant if Nevada Game Warden SPENCER had advised, truthfully, that the Plaintiff was an Indian and that his residence was located within the exterior boundaries of the Fallon Indian Reservation.

16. In his application for Justice of the Peace WARD's Search and Seizure Warrant (Affidavit), Nevada Game Warden SPENCER did not state sufficient facts to support the issuance of a valid search warrant. Observation back in June 1988 and only reported January 1989 and not acted on prior to this date are too remote. See Affidavit of Justice WARD, page 1, lines 26-28. "A bedroom" as reported by SPENCER, and attributed to Tribal Police BOB WISE, is too general. The location of the bedroom should have been specified. See Affidavit, page 2, lines 8-13.

The purpose of having eh affiant swear before the tribal judge is so that the tribal judge can see and test the sincerity of the information and reliableness of the confidential informant used by Nevada Game Warden SPENCER. See Wm. E. Ringel, Searches & Seizures, Arrests and Confessions (Clark Boardman Co., Ltd. NY 1972) at §200. The acts of Tribal Court Judge REBECCA HAROLD merely bootstrapped a tainted Affidavit and state Search and Seizure Warrant and forced same upon the Plaintiff; tribal courts should not merely rubber-stamp the actions of state court judges.

17. See Title 4, Fallon Tribes Law and Order Code, §4-40-060(a), (b) and (c) (Search Warrants for Other Jurisdictions). Where another tribe seeks the same, tribal law has special provisions for them. See Id §4-40-060(d).

18. The Affidavit of Nevada Game Warden SPENCER to Justice of the Peace WARD states that the Plaintiff has been in possession of two Big Horn sheep heads since June 1988. Surely there is no concern for the Plaintiff destroying or otherwise disposing of the items given the length of time between the reliableness of SPECNER's Confidential Informant and Game Warden SPENCER acting on the information. As well, Tribal Police lt. BOB WISE did not communicate any emergency situation according to SPENCER's Affidavit.

19. See William L. Prosser, Torts (Hornbook Series, West Pub. Co. 1978) (hereinafter "Prosser") at 73 ("The trespass may be committed not only by entry upon the land, or by casting objects upon it, but also by causing a third person to enter. The defendant may ... lead him to enter by false representations ... or other inducement. . . .")

20. The law of the State of Oregon is much like that of the Fallon Tribes. See Collier v City of Portland, 57 Or.App. 341, 644 P.2d 1139 (1982) (There was a trespass when police entered the Plaintiff's residence without a warrant unless the law provided for an exception which was applicable under the facts of the case.) Title 4, Fallon Tribes Law and Order Code, §4-40-050(d)(4) allows a tribal court judge to recommend to a criminal defendant that they initiate trespass and other civil actions against errant police officers where the criminal defendant unsuccessfully challenges the issuance of the tribal search warrant. See also Walker v. City of Denver, 720 P.2d 619 (Colo.App.1986) (Absent owner's permission, it is a trespass for a police officer to remain on premises longer than is necessary to remove property properly seized.).

Police officers are also liable for trespass based on an unlawful order of a judge. See Prosser, supra, at 74 ("The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however, reasonable, that he is committing no wrong. Thus he is a trespasser although he believes that ... he has ... the legal privilege of entry.").

The law of the Fallon Paiute-Shoshone Tribes does not adhere to the position of the state of Kentucky. See Heinze v. Murphy, 253 Ky. 382, 69 S.W.2d 711 ( ) (It is not a "trespass" for an officer to go upon another's premises in the line of his duty.).

21. See Prosser, supra, at 76 ("Thus it is a trespass to ... make an unpermitted use of [goods], or to move them from one place to another. . . .").

22. See Prosser, supra, at 852 ("But the extension of the remedy has gone even further, and has included proceedings in which there has been interference with property or business, or damage differing in kind from the ordinary burden of defending a lawsuit, such as attachment, ... the search of premises under a warrant . . . .").

23. See Prosser, supra, at 856-857.

24. See Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930) (bringing a mob to the plaintiff's door at night with a treat to lynch him unless he left town). See also Prossor, supra, at 56-57.

APPENDIX I

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES

FLOYD HICKS,

Plaintiff,

vs.

REBECCA HAROLD, et al.

Defendants. /

Case No. CV-FT-91-034

AMENDED COMPLAINT

NOW COMES the Plaintiff, Floyd Hicks, through legal counsel, Ronald E. Johnny, for causes of action against Defendants, alleges as follows:

FIRST CAUSE OF ACTION

(Trespass to Land)

1. The plaintiff, Floyd Hicks, is an adult Native American; an enrolled member of the Fallon Paiute-Shoshone Tribes; a citizen of both the state of Nevada and the United States; and, a resident of the Fallon Paiute-Shoshone Indian Reservation.

2. The defendant, Rebecca Harold, is a non-Indian, Nevada state-licensed attorney, is the chief judge of the Fallon Tribal Court, and employee or official of the Fallon Paiute-Shoshone Tribes; the defendant, state of Nevada, is a governmental entity; William Mollini (sic) is the Director of the Nevada Department of Wildlife; the defendants, Michael C. Spencer, Rich Ellington and Bill Fitzmorris, are non-Indians and employed by the state of Nevada as game wardens for the Nevada Department of Wildlife; the defendant Confidential Informant, may be an Indian but may also be a non-Indian; the defendants Robert Wise and Bob Minton, are non-Indians, were, on the dates complained of herein, employees or officials of the Fallon Paiute-Shoshone Tribes and employed as tribal police officers; the defendants John Does I thru X, are either officials and/or employees of the Fallon Paiute-Shoshone Tribes or

the state of Nevada or Churchill County, who assisted in or otherwise made the decision and actions complained of herein.

3. All defendants are being sued in their individual and officials capacities.

4. On or about August 30, 1990 and June 13, 1991, the defendant Michael C. Spencer, also known as "Mike Spencer," executed a three page Affidavit in the matter captioned In The Matter Of The Application For A Search Warrant (Justice Court, New River Township, County of Churchill, State of Nevada).

5. The Affidavits, identified-above, advises that Mike Spencer is investigating a possible crime, the possessing of killing of a big horn sheep of the California subspecies, a gross misdemeanor, in violation of N.R.S. 501.376, involving the plaintiff, Floyd Hicks.

6. The Affidavits, identified-above, advises that the information supplied by defendant, Confidential Informant of Michael C. Spencer, was more than two-years old on August 30, 1900.

7. The Affidavit of Mike Spender issued on or about June 13, 1991, to the Justice of the Peace, New River Township, Churchill County, state of Nevada, did not mention the investigation and/or search and seizure conducted of the plaintiff's premises on or about August 30, 1990.

8. On or about August 30, 1990, Justice of the Peace, Marilyn Craig, issued a document titled "Search Warrant," which advised any police officer in the County of Churchill, state of Nevada, that the Justice Court lacked jurisdiction to issue a search warrant against the plaintiff, Floyd Hicks.

9. On or about June 13, 1991, the Justice of the Peace, New River Township, Churchill County, State of Nevada, issued a document titled "Search Warrant."

10. On August 30, 1990, Justice of the Peace, Marilyn Craig, issued a document titled "Search Warrant," which was not a search warrant.

11. On or about August 30, 1990, and June 13, 1991, the defendant Michael C. Spender, and the state of Nevada, sought legal counsel from the Churchill County District Attorney with regard to his authority to search and seize items of evidence on the Fallon Indian Reservation.

12. On or about June 13, 1991, the defendant, Rebecca Harold, without lawful authority, against specific tribal laws, and under color of law, authorized the defendant, Michael C. Spencer, and state of Nevada, to enter the allotted Indian lands and residence of the plaintiff, Floyd Hicks, and to search and seize the plaintiff's personal property.

13. On or about August 30, 1990, and June 13, 1991, the defendant Michael C. Spencer, and state of Nevada, without lawful authority or permission of the plaintiff, Floyd Hicks, and under color of law, entered the allotted Indian land and residence of the plaintiff.

SECOND CAUSE OF ACTION

(Trespass to Chattels)

14. The plaintiff incorporates paragraphs number 1 through 13 here.

15. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, without lawful authority, and under color of law, searched the residence of the plaintiff, Floyd Hicks, 7755 Stillwater Road, Fallon Indian Reservation.

16. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, while on the plaintiff's allotted Indian lands, without lawful authority, seized, under color of law, the personal property of the plaintiff, to-wit: a 45 year old, mounted, head of a big horn sheep of the Rocky Mountain subspecies.

17. The plaintiff's 45 year old, mounted, head of a big horn sheep of the Rocky Mountain subspecies, was of great personal value to the plaintiff and had great financial value.

18. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, without lawful authority, and under color of law, removed the personal property of the plaintiff, to-wit: 45 year old, mounted, head of a big horn sheep of the Rocky Mountain subspecies, from the residence and allotted Indian lands of the plaintiff and the Fallon Indian Reservation.

THIRD CAUSE OF ACTION

(Violation of Civil Rights Under Federal Law)

19. The plaintiff incorporates paragraphs number 1 through 16 here.

20. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, violated the plaintiff's civil rights under federal law.

FOURTH CAUSE OF ACTION

(Violation of Civil Rights Under Tribal Law)

21. The plaintiff incorporates paragraphs number 1 through 20 here.

22. On or about June 13, 1991, the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, violated the plaintiff's civil rights under tribal custom, tradition and common law which is reflected also in the Law & Order Code of the Fallon Paiute-Shoshone Tribes (1986).

FIFTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress and Mental Harm)

23. The plaintiff incorporates paragraphs number 1 through 22 here.

24. That on or about August 30, 1990 and June 13, 1991, and at times thereafter, the plaintiff attempted to advise all defendants, identified-above, that they were in violation of tribal and federal law.

25. That between August 30, 1990 and this date, the plaintiff has been the subject of much ridicule and fun by many people because of the actions of the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada.

26. That the actions of the defendants, Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, on or about August 30, 1990, and June 13, 1991, combined, caused the plaintiff to suffer great emotional and mental harm.

27. That the actions of the defendants Michael C. Spencer, Rich Ellington, Bill Fitzmorris, and state of Nevada, on or about August 30, 1990, and June 13, 1991, combined, caused the plaintiff to loose his personal property, to-wit: the two, aged, mounted big horn sheep heads of the Rocky Mountain subspecies.

WHEREFORE THE PLAINTIFF PRAYS THE COURT:

1. For the First Cause of Action, Trespass to Land, award the plaintiff $25,000 PLUS punative (sic) damages of $50,000.

2. For the Second Cause of Action, Trespass to Chattels, award the plaintiff $25,000 PLUS punative (sic) damages of $50,000.

3. For the Third Cause of Action, Denial of Civil Rights Under Federal Law, award the plaintiff $250,000 PLUS punative (sic) damages of $1,000,000.

4. For the Fourth Cause of Action, Denial of Civil Rights Under Tribal Law, award the plaintiff $250,000 PLUS punative (sic) damages of $1,000,000.

5. For the Fifth Cause of Action, Intentional Infliction of Emotional Distress and Mental harm, award the plaintiff $1,000,000 PLUS punative (sic) damages of a reasonable sum.

6. For any additional relief to which the plaintiff may be entitled, award the plaintiff a reasonable sum.

7. Pay the plaintiff's attorneys fees and costs of suit.

Respectfully submitted June 1, 1994.
BY: RONALD E. JOHNNY

APPENDIX J

IN THE TRIBAL COURT

IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES

FALLON, NEVADA

FLOYD HICKS,

Plaintiff,

Case No. CV-FT-91-034

vs.

MOTION TO QUASH SERVICE OF PROCESS

Tribal Judge REBECCA HAROLD; STATE OF NEVADA; Director, Nevada Department of Wildlife, WILLIAM MOLLINI; Nevada State Game Wardens MICHAEL C. SPENCER, RICK ELLINGTON, and BILL FITZMORRIS and their CONFIDENTIAL INFORMANT; Tribal Police Officers BOB WISE and BOB MINTON; and JOHN DOES I thru X. and, REBECCA HAROLD, WILLIAM MOLLINI, MICHAEL C. SPENCER, RICK ELLINGTON, BILL FITZMORRIS, CONFIDENTIAL INFORMANT, BOB WISE, BOB MINTON, and JOHN DOES I thru X, individually,

Defendants. /

COME NOW Defendants STATE OF NEVADA; WILLIAM MOLINI, Director, Nevada Department of Wildlife; and MICHAEL C. SPENCER, RICH ELLINGTON, and BILL FITZMORRIS, Nevada State Game Wardens, specially appearing through their attorney, C. WAYNE HOWLE, Deputy Attorney General for the State of Nevada, and move this Court for its order quashing service of process as to said specially appearing Defendants and for no other relief.

This motion is brought pursuant to NRCP Rule 12(b) and is made upon the ground and for the reason that this court lacks jurisdiction over the specially appearing Defendants because (1) the State of Nevada has not consented to suit against it or its officers and employees in this court; and (2) there is insufficient service of process to secure personal jurisdiction over defendants.

This motion is based upon the attached Memorandum of Points and Authorities, and the papers and pleadings of record herein.

POINTS AND AUTHORITIES

Personal jurisdiction is based on a combination of two elements, amenability to jurisdiction, and service of process. Perfumer's Workshop v. Roure Bertrand du Pont, 737 F. Supp. 785, 787 (S.D.N.Y. 1990); Thoenes v. Tatro, 529 P.2d 912, 918 (Or. 1974); Harvey v. Price, 603 F. Supp. 1205 (D. Ill. 1985). Because neither of these factors is present with regard to the defendants who specially appear by this motion, this court lacks personal jurisdiction over them and should issue its order quashing service of process.

(1) The specially appearing defendants are not amendable to the process of the Fallon Tribal Court.

The specially appearing defendants are the State of Nevada and its officers and employees. They are not amenable to the process of this court. The State has waived its immunity to a limited extent as set forth at NRS 41.0305 et seq., but has consented to suit only "in a court of competent jurisdiction of this state." NRS 41.031(2).

The Fallon Tribal Court is not a "court of this state," see Hubert v. City of Acworth, 267 S.E.2d 823 (Ga. App. 1980) ("court of this state" means a court created by the constitution and laws of the state), nor can plaintiff demonstrate otherwise that the Nevada Legislature intended to permit suit against the State in a tribal court. Accordingly, the immunity of the specially appearing defendants prevents this court from asserting its jurisdiction over them.

Further, Plaintiff has pleaded no facts which show that the State has waived its immunity with regard to the claims in the complaint. "To state an actionable claim against the state, a pleader must plead facts in the complaint in avoidance of immunity."

McCann v. State Dep't of Mental Health, 247 N.W.2d 521 (Mich. 1976) (emphasis in original). This also is the rule in Nevada. Taylor v. State of Nev. & Univ. of Nev., 73 Nev. 151, 311 P.2d 733 (1957). See also 81A C.J.S. States § 322 (1977). Plaintiff provides no basis for finding that the State has waived its immunity, but relies instead on unspecified federal law, tribal law[1] and a United States Supreme Court opinion[2], none of which provide any basis for waiver. First Amended Complaint at 3.

The recent opinion of the United States Supreme Court in the case entitled Blatchford v. Native Village of Noatak, ____ S. Ct. ____, 1991 WL 107382 (1991), confirms this court's lack of jurisdiction. Although that decision dealt with a suit against the State of Alaska filed in federal court, the law which the court relied upon to reach its result logically precludes jurisdiction over a state in a tribal court. The Supreme Court first recognized that the "States entered the federal system with their sovereignty intact." Id. at 3. It recognized the full vitality of the states' sovereign immunity based on "traditional principles of immunity." Id. And it concluded that the establishment of a federal court system did not abrogate the states' immunity, even in cases wherein a state is sued by an Indian tribe acting in its sovereign capacity.

A state is no more amenable to suit by a tribe than it is to suit by a foreign country. Id. at 3. One reason is the absence of mutuality which would result by recognition of Indian jurisdiction over states: tribes have not surrendered their immunity from suit by

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[1] Although the Tribal Code purports to create an implied consent to jurisdiction over persons who appear upon the territory of the Tribe, such consent is not effective to create a waiver of the State's immunity. The acts of the agents of the State cannot waive the State's immunity, for it is "the legislature alone which has the power to waive immunity or to authorize such waiver." Taylor v. State of Nev. & Univ. of Nev., 73 Nev. 2d at 153.

[2] The opinion in National Farmers Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447 (1985), merely holds that objections to tribal jurisdiction must first be made in tribal court. The opinion says nothing about the jurisdiction of tribal courts over the states, and provides no basis for finding a waiver of immunity.

the states, and from this it follows that the states have not surrendered their immunity in suits brought by tribes.

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citation], as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Id. at 4.

Because the immunity of the State survives unaltered except by express Congressional action, this court cannot extend its jurisdiction to reach the specially appearing defendants, and the process served should be quashed.

(2) The Eleventh Amendment of the United States Constitution prevents tribal court assertion of jurisdiction over the State, its officers and employees.

Specially appearing defendants rely upon the Eleventh Amendment of the United States Constitution as a separate basis for bringing this Motion to Quash Service of Process. The opinion of the Supreme Court in Blatchford v. Native Village of Noatak, supra, stands primarily for the principle that the Eleventh Amendment bars suits by Indian tribes against States without their consent. Although the Blatchford opinion dealt with a suit filed in federal court, it must also be true that the Eleventh Amendment would similarly preclude the same claim against the state in a tribal court. Any other conclusion would render the opinion of the Supreme Court in Blatchford a virtual nullity.

The Court in Blatchford said:

> Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control . . . . There is . . . the postulate that

> States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.

1991 WL 107382 at 3, quoting from Monaco v. Mississippi, 292 U.S. 313 (1934). Just because the Eleventh Amendment does not expressly set forth the immunity of states from suit in tribal courts does not intend an absence of such immunity. To the contrary, such immunity must be implied; otherwise the immunity from suit by tribes in federal court, determined to exist in Blatchford, would be meaningless.

(3) Specially appearing defendants are protected by the State's immunity and are not subject to the jurisdiction of the court whether named as State employees or individually.

By the Plaintiff's own description of the facts, the Nevada game wardens named as defendants were engaged in their work as law enforcement officers when the claims contained in the complaint are alleged to have arisen. As such the officers are entitled to the immunity set forth at NRS 41.032(2), which makes no distinction between persons named individually and those named as employees of the State. The immunity of the statute extends to employees performing discretionary functions whether or not the discretion involved is abused. Id.

The importance of protecting law enforcement personnel from individual liability was recognized by the United States Supreme Court in Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987). "Permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." 438 U.S. at 638, 107 S. Ct. at 3038. The Supreme Court recognized a qualified immunity for federal law enforcement officers, and held that whether an official may be held personally liable depends on the objective legal reason-ableness of the official's action, assessed in light of legal rules that were clearly established at the time the action was taken, and without regard to his personal belief in the reasonableness of his action.

Applying this rule fashioned by the Supreme Court, the Plaintiff thoroughly fails to set forth any evidence which would

permit this court to exert jurisdiction over the State officials named individually. First, there is no proof, much less allegation, that William Molini, Director, was personally involved in any aspect of the actions giving rise to the claims. Second, the record discloses that the actions of the other individuals were objectively legally reasonable beyond any doubt. The affidavit of Mike Spencer, attached to the complaint as Plaintiff's Exhibit No. 3, sets forth the officer's reliance upon a confidential informant and corroborating information as a basis for the request for a search warrant. The search warrant, attached to the complaint as Plaintiff's Exhibit No. 2, is regular on its face. The Tribal Court order approving the search warrant, Plaintiff's Exhibit No. 1, is duly signed and dated by the Tribal Court Judge. All of the material on file clearly establishes, not that the officials acted in an objectively unreasonable manner, but that they did everything they could to stay within the law. Plaintiff therefore utterly fails in his burden to show that the immunity of Nevada officials should not extend to them as individually named defendants.

The opinion of the Nevada Supreme Court in Edgar v. Wagner, 101 Nev. 226, 699 P.2d 110 (1985), does not dictate a different result. There the court limited the immunity conferred by the statute to actions taken in subjective good faith. The court then ruled that the motion to dismiss the action against a district attorney was improperly granted when the complaint contained bare allegations of malicious actions and bad faith. But several factors distinguish the Edgar decision from the present case. First, the Edgar decision pre-dates the U.S. Supreme Court decision in Anderson v. Creighton. The Nevada court indicated its inclination to follow U.S. law by relying upon it in Edgar, and it would likely accept the objective standard now controlling in the federal courts.

Second, the motion considered by the court in Edgar was one for failure to state a claim, not one to quash service. By definition, a motion brought under NRCP 12(b)(5) deals with bare allegation and not with evidence; but a motion to quash service challenging personal jurisdiction requires plaintiff to make an affirmative showing of personal jurisdiction. Fields v. Sedwick Associated Risks, Ltd., 796 F.2d 299 (9th Cir. 1990). See generally 5A C. Wright & A. Miller, Federal Practice and Procedure (2d ed. 1990) at 248 ("on the motion, plaintiff bears the burden to establish

the court's jurisdiction"). Bare allegation will not suffice, particularly where the record fully supports an absence of malice.

(4) Service of the Summons and Complaint upon the State, its officer and employees was improper and therefore without effect.

Service on the specially appearing defendants was improper because there is no provision in the Fallon Law and Order Code for service outside of the reservation. "In the absence of personal service within the state, jurisdiction over a non-resident can only be obtained if the legislature has provided another method of service of process." 21 C.J.S. Courts § 59. See Williams v. Williams, 433 A.2d 1316 (N.H. 1981), appeal dismissed, 455 U.S. 930 (1982). Service of process from this court outside of its territorial jurisdiction therefore was ineffective by whatever mode, and process against the specially appearing defendants should be quashed for this reason.

CONCLUSION

For the above stated reasons, the specially appearing defendants respectfully request this court to grant their Motion to Quash Service of Process and to enter its Order accordingly.

Submitted: July 18, 1991
BY: C. Wayne Howle
Deputy Attorney General

APPENDIX K

IN THE TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES
FALLON, NEVADA

FLOYD HICKS	**Case No. CV-FT-91-034**
Plaintiff,	**SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SERVICE OF PROCESS**
vs.	
Tribal Judge REBECCA HAROLD, et al,	
Defendants. /	

COME NOW Defendants STATE OF NEVADA; WILLIAM MOLINI, Director, Nevada Department of Wildlife; and MICHAEL C. SPENCER, RICH ELLINGTON, and BILL FITZMORRIS, Nevada State Game Wardens, specially appearing as officials for the State of Nevada and individually through their attorney, C. WAYNE HOWLE, Deputy Attorney General for the State of Nevada, and present this Supplemental Brief as directed by the Court. Defendants do not intend by this appearance a waiver of any immunity or defense which is available to them.

SUPPLEMENTAL POINTS AND AUTHORITIES

The Court has requested briefs assessing the import of two United States Supreme Court cases for the determination of the Motion to Quash Service of Process, filed by specially appearing defendants. Those cases, United States v. Hall, 440 U.S. 410, 99 S. Ct. 1182 (1979), and Hafer v. Melo, ___ U.S. ___, 112 S. Ct. 358 (1991), are discussed below.

I. United States v. Hall, 440 U.S. 410, 99 S. Ct. 1182 (1979).

In Nevada v. Hall, a California resident sued the State of Nevada in a California court for injuries suffered in an accident which occurred in California, involving an employee of the State of Nevada. The Court rejected Nevada's claim of sovereign immunity and allowed Nevada to be sued in the other state's court.

The circumstances of the Supreme Court case differ so significantly from those in the instant action that the opinion in the former cannot be considered controlling on the issue of state sovereign immunity raised in the pending motion. To the extent that it is relevant authority, the Supreme Court's decision supports granting the motion.

A. The decision in "Nevada v. Hall" did not address tribal-state relations.

The question presented in Nevada v. Hall was "whether a State may claim immunity from suit in the courts of another State." 440 U.S. at 415. This presents the first clear difference between Nevada v. Hall and this case: Nevada v. Hall addressed the relationship between states, while this case concerns the relationship between a state and an Indian tribe, thereby raising significant Indian law questions.[1]

The Supreme Court dealt with two discrete, co-equal sovereigns; this case deals with two disparate sovereigns whose authority is overlapping. The differences between the sovereigns are numerous. "The sovereignty that the Indian tribes retain is of a

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[1] An acknowledged authority has said of the field of Indian law:

> Indian law is an extraordinarily rich and diverse field. The cases, both old and new, weave a fabric with threads drawn from constitutional law, international law, federal jurisdiction, conflict of laws, real property, contracts, corporations, torts, domestic relations, procedure, trust law, intergovernmental relations, sovereign immunity, and taxation. Typically, as those fields meld into Indian law, the blend produces a new variation that could not have been predicted by analysis of the applicable law from those other fields.

F. Cohen, Handbook of Federal Indian Law at p. 1 (1982 ed.). Thus any effort to study the implications of the Supreme Court's Nevada v. Hall decision for the pending motion must proceed with full awareness of the differences created by the presence of Indian law issues in the instant action.

unique and limited character." Rice v. Rehner, 463 U.S. 713, 719 (1982). "Unlike the states, Indian tribes possess only a limited sovereignty that is subject to complete defeasance." Donovan v. Coeur d'Alene Tribal Farms, 751 F.2d 1113, 1115 (9th Cir. 1985). "A tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations.'" Brendale v. Confederated Tribes & Bands of Yakima, 109 S. Ct. 2994, 3005 (1989).

The plaintiff in this case, by naming the State of Nevada and its officers and employees as defendants in an action brought in the tribal forum, raises questions of first impression concerning the external relations of the Tribe with the State. Obviously these questions were not addressed in Nevada v. Hall. Defendants respectfully suggest that a fair review of the relevant Indian law principles which played no part in Nevada v. Hall establishes that the Tribe's sovereignty has been implicitly divested, Duro v. Reina, 110 S. Ct. 2053, 2060 (1990), to the extent that its sovereignty would permit it to disregard the State of Nevada's sovereign immunity.

The Court in Blatchford v. Native Village of Noatak, ___ U.S. ___, 115 L.Ed. 2d 686 (1991), recognized as a "presupposition of our constitutional structure . . . that the States entered the federal system with their sovereignty intact." Under the "plan of the convention," the states subjected themselves to suit by other states and by the United States in federal court. Id. Otherwise, state immunity remains undiminished.[2] There was no submission to suit by Indian tribes in federal court. Id. On the basis of the same presupposition, there can have been no intention in the formation of the Union that tribal sovereignty be in derogation of the states' sovereign immunity in any court within the states' own borders. Because jurisdiction in such a situation is incompatible with the states' sovereign immunity--just as federal court jurisdiction was incompatible with state immunity in Blatchford--the contrary must

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[2] This is fully consistent with the Court's holding in Nevada v. Hall. It is precisely because the states exist as co-equal sovereigns that the California court was not required to recognize Nevada's claim to sovereign immunity any more so than one sovereign nation would be constrained to recognize another sovereign nation's immunity.

be concluded: that the dependent status of the tribes intends a divestment of the tribal sovereignty insofar as it would otherwise permit suit against the state in which the tribal forum is located.

B. The Plaintiff in "Nevada v. Hall" was not a citizen of the defendant state, and the action was not filed in the State of Nevada.

The Court explained that it would be unfair to require a citizens of California to abide by the State of Nevada's limited liability rules.

> In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.

440 U.S. at 427.

In stark, obvious contrast, the citizens of the Fallon Paiute Shoshone Tribe, including the plaintiff in this case, are citizens of the defendant state. They have as much say, through their vote, as any other citizen of Nevada in the determination of the extent to which the state will allow itself to be legally liable. Op. Nev. Att'y Gen. 166 (May 2, 1974) (Indians are "entitled to vote in state and county elections provided they comply with statutory requirements which have to be fulfilled by any other voter"). No unfairness is caused by holding the plaintiff subject to that determination; it would be unfair instead to allow him to elude democratically determined limitations of his own state's government by resort to this Tribal Court.

Moreover, in this case, the action was filed within the State of Nevada, in a court located within the exterior boundaries of the State. The jurisdictions of the state and tribal governments are therefore overlapping. Such was not the case in Nevada v. Hall.

An Indian reservation is generally considered to be a portion of the state within which it is located.

> Whenever, upon admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction

> over that reservation, it has done so by express words.

United States v. McBratney, 104 U.S. 621, 623-24 (1881).

Therefore, this is not a case like the one cited by the Court in a footnote, 440 U.S. at 427, n.29, where the interest of one state in property acquired in another state was as a mere proprietor as opposed to a sovereign. In contrast, it is well established that the states retain their sovereignty in Indian country. United States v. McGowan, 302 U.S. 535 (1938). Perhaps the broadest statement of this principle is found in New York, ex rel. Ray v. Martin, 326 U.S. 496, 499, 68 S. Ct. 307, 308 (1946), where the Court held that "in the absence of a limiting treaty obligation or Congressional enactment, each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries." See also Shakopee MDewakanton Sioux v. City of Prior Lake, 771 F.2d 1153, 1156 (1985), cert. denied, 475 U.S. 1011 ("that a tribal government exercises sovereign powers on a reservation and that reservation lands are held in trust by the United States does not prevent the reservation from constituting a portion of a state and a political subdivision of a state"). Nevada thus has a heightened interest in the matter before this court because the land where the acts occurred giving rise to the causes of action against the State are part of the State, located within the State's sovereign jurisdiction. The balance of interests is therefore far different from that in Nevada v. Hall and requires a different determination.

C. Tribal exercise of jurisdiction in this case poses a substantial threat to Nevada's ability to fulfill its sovereign responsibilities.

Liability was allowed against Nevada in Nevada v. Hall in part because it did not impinge on the State's sovereign responsibilities.

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different

state policies, either of California or Nevada, might require a different analysis or a different result.

440 U.S. at 425, n.24.

The circumstances of the present case are not even remotely similar to those referenced in the Court's footnote. The alleged injuries occurred within the State of Nevada, by wardens acting under the State's game laws. The action therefore has far stronger significance for Nevada's exercise of sovereign authority within its own borders.

The regulation of game falls within a state's police powers. "Protection of the wild life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection." Lacoste v. Department of Conservation, 263 U.S. 545, 552 (1924), quoted in Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 392 (1978). Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and general welfare. Marshall v. Kansas City, 355 S.W.2d 877, 883 (Mo. 1966). It is "an indispensible, essential and vital attribute of sovereignty.... [T]he Constitution supposes the preexistence of the police power and must be construed with reference to that fact." 16A Am.Jur.2d Constitutional Law § 360 (1979). Cf. Rice v. Rehner, 463 U.S. at 731 (recognizing state's interest in liquor regulation pursuant to police power as support for state liquor regulation in Indian country).

This action, filed in this tribunal, is an imposition on and impediment to Nevada's sovereign prerogative to carry out its purposes with regard to its wildlife. Wardens must be allowed to enforce the game laws of the State without fear of being held to a standard of liability higher than that which the legislature of the State has determined is appropriate. The State's interest as a sovereign is therefore manifestly greater than in Nevada v. Hall. This distinction, too, requires a determination different from that in Nevada v. Hall.

D. The Fallon Paiute-Shoshone Tribe has retained all sovereign immunity and does not consent to the filing of any suit against it for money damages.

The Court in Nevada v. Hall allowed a California court to impose the same degree of liability on Nevada as it could have

imposed on its own sovereign.

> In further implementation of that policy [protecting those injured on highways], California has unequivocally waived its own immunity from liability for the torts committed by its own agents and authorized full recovery even against the sovereign. As the California courts have found, to require California either to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery.

440 U.S. at 425.

Again the facts in the present case deviate significantly from those of the Nevada v. Hall paradigm. The sovereign in whose court this action is brought has not waived any immunity. The Fallon Paiute-Shoshone Tribe has and retains all

> sovereign immunity and does not consent to the filing of any suit or to the entry of any judgement or order against it, the effect of which is to order the payment of money directly or indirectly.

Law and Order Code of the Fallon Paiute Shoshone Tribe § 1-10-030. This code section indicates that extension of immunity to the State of Nevada would affront no forum policy.

> The power of the Tribe to so restrict its liability is clear. It is well settled that Indian tribes possess the common law immunity from suit in state or federal court traditionally enjoyed by sovereign powers. Indian tribes may not be sued absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress.

Suarez v. Confederated Tribes & Bands of the Yakima Indian Nation, 18 Indian L. Rep. 3120 (E.D. Wash. 1991). "'Without congressional authorization,' the 'Indian Nations are exempt from suit.'" Santa Clara Pueblo v. Martinze, 436 U.S. 56, 59 (1978) (citations omitted).

Moreover, it has been held that tribal immunity operates regardless of where a suit is brought. Val/Del, Inc. v. Superior Ct.

of the State of Ariz., 703 P.2d 502, 504 (Ariz. App. 1985). But see Pueblo of Acoma v. Padilla, 109 S. Ct. 1767 (1989) (Justice White's dissent to Court's denial of petition for writ of certiorari notes difference in state courts concerning the applicability of Nevada v. Hall to determine effect of tribal immunity in state courts).

Nevada itself determines the question of another state's liability by reference to Nevada's own liability for similar acts. Mianecki v. District Ct., 99 Nev. 93, 658 P.2d 422 (1983). Thus under Nevada's own law, NRS 41.032, the instant claims, if brought in a Nevada court against another state, would be barred by comity.

It thus defies all notions of fairness to hold Nevada liable for damages which this court could not award against its own sovereign; which Nevada could not award against a defendant tribe; and which Nevada would not allow in its courts against a foreign state. As a simple matter of fairness, then, Defendants ask that their motion be granted.

CONCLUSION

Nevada v. Hall should not be used as a guide for determining the pending motion, because the opinion of the Supreme Court does not address the significant state-tribal issues involved. To the extent the Nevada v. Hall opinion is referenced, it supports granting the motion because of the disparities in the factual bases for the two cases.

II. Hafer v. Melo, U.S. , 112 S. Ct. 358 (1991).

This case arose when the newly elected Auditor General of Pennsylvania discharged certain employees, who then filed an action in federal court for money damages under 42 U.S.C. § 1983. Section 1983 expressly creates a private cause of action against any person who, acting under color of state law, violates the civil rights of anyone else within United States jurisdiction. The court has ruled, however, that neither a state nor an officer or employee of a state in their official capacity is a "person" against whom an action may be brought. The question in Hafer v. Melo was whether such an officer or employee could be made liable for money damages under § 1983 in their capacity as an individual. The Court answered in the affirmative.

A. Plaintiff's claims are not brought pursuant to statute expressly creating a cause of action based on violation of constitutional rights.

Plaintiff's claims in this case do not rely on 42 U.S.C. § 1983 or the United States Constitution. Instead they rely on the Indian Civil Rights Act (ICRA) and common law tort theories. This makes a significant difference for the outcome.

The Court has held that federal government officials are ordinarily accorded absolute immunity from liability under state tort theories, so long as their actions fall within their discretionary authority. Barr v. Mateo, 360 U.S. 564 (195), Westfall v. Erwin, 484 U.S. 292, 296-97 (1988). The development of liability for officials in their individual capacities as discussed in Hafer has occurred only in the field of constitutional violations.

> If a public officer is acting with proper authority and the acts are "discretionary," the Court in Barr v. Mateo held there is no liability even though the officer acts willfully or maliciously.
>
> The advent of "constitutional torts" in 1971 substantially reduced the scope of the immunity defense in suits against public officers.... Put simply, public officials who violate constitutional rights might be personally liable to the injured person for damages.

Ralph W. Johnson and James M. Madden, Sovereign Immunity in Indian Tribal Law, 12 American Indian Law Review 153, 175-75 (1984). Thus only for certain wrongs is the immunity of government officials qualified.

The protections for wrongs done under the ICRA differ greatly from those afforded under 42 U.S.C. § 1983. Vindication for wrongs done under the ICRA are extremely limited. "Congress has provided no private right of action to enforce the [Indian Civil Rights] Act, other than habeas corpus." Imperial Granite Co. v. Pala Band of Indians, 940 F.2d 1269, 1271, n. 3 (9th cir. 1991). "The structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one." Santa Clara Pueblo v.

Martinze, 436 U.S. at . It is not even clear that the ICRA provides a remedy against a tribal sovereign in its own courts.

> In testimony before the Commission [on Civil Rights], Judge Elbridge Coochise, administrator and chief judge of the Northwest Intertribal Court System, was asked whether he thought the ICRA waived sovereign immunity. He responded in the negative and indicated that it is "something we need to look at and give the tribes the opportunity, like any other government, to say 'Yes, we waive that,' or 'No, we don't.'"

United States Civil Rights Commission, The Indian Civil Rights Act at 67 (June 1991). The Tribe may have waived the absolute immunity of tribal officials in their individual capacities, Fallon Tribal Code § 1-10-40, but this is not equivalent to an express Congressional signal such as the one in § 1983, and implies no waiver of the State's immunities.

In contrast, Congress operated with a now undisputed intent to establish a remedy for individuals whose rights under 42 U.S.C. § 1983 and the Constitution are abused.

> Through § 1983, Congress sought "to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position." Accordingly, it authorized suits to redress deprivations of civil rights by persons acting "under color of any [state] statute, ordinance, regulation, custom, or usage."

Hafer, 112 S. Ct. at 363.

Congress' failure to create an express remedy for ICRA violations like the one it created for constitutional violations justifies different treatment of the immunity question under the ICRA. The qualified immunity exception has no place in the enforcement of the ICRA. Defendants should be measured under the standard rule established in Barr v. Mateo. Under that standard, the individually named defendants are entitled to absolute immunity because they were clearly acting within their discretionary authority under the State's game laws.

B. The defense of reasonable reliance on the law was not addressed in Hafer.

Even if the individually named defendants are not entitled to immunity under the Barr standard, they may still make personal defenses at the earliest stages of litigation, and the court must determine the validity of the defenses even where they involve questions of fact.

> Because the entitlement is an immunity from suit rather than a mere defense to liability, we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.
>
> Immunity ordinarily should be decided by the court [instead of a jury] long before trial.

Hunter v. Bryant, 52 S. Ct. Bull. (CCH) B469 (Dec. 16, 1991) (citations omitted) (emphasis in original). The Hafer opinion is does not speak to the validity of these defenses.

The government official's argument in Hafer was that she could not be made personally liable since she acted within her official capacity when she terminated the plaintiff employees. She did not admit to being an individual defendant, and the Court therefore did not explore "personal immunity defenses such as objectively reasonable reliance on existing law." 112 S. Ct. at 362. Specially appearing individual defendants have made that defense; Hafer offers no guidance on its determination.

The Hafer decision thus did not address the test to be applied when determining whether immunity should be recognized. In Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991), the court enunciated the test when it found two peace officers immune from claims they had violated Indian treaty rights:

> [T]he qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so 'clearly established' as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a

> reasonable officer could have believed lawful the particular conduct at issue.

931 F.2d at 627. Immunity should be given and discovery should not be permitted where the pleadings fail to claim violation of a clearly established right. Id., 931 F.2d at 628, n.6. The pleadings and papers in this case establish no such violation. The law for issuance and execution of search warrants on the Fallon Reservation is not at all clear, as the pleadings indicate; and rights and remedies under the ICRA are unclear, in view of Santa Clara Pueblo v. Martinez.

Nor has plaintiff alleged violations of law with sufficient specificity. "Mere allegations of malice do not destroy qualified immunity.... The complaint must... allege specific facts demonstrating that the actions of the individual state defendants were objectively unreasonable." Bellamy v. Borders, 727 F. Supp. 247 (D.S.C. 1989). The only specific allegation in plaintiff's complaint is that the officers failed to leave a copy of the warrant with the plaintiff. However:

> [A] search and seizure is not illegal if irregularities in the procedure do not affect the substantial rights of the accused.... As a general rule, statutes which require peace officers to exhibit or deliver a copy of the search warrant at the place to be searched are viewed as ministerial only and failure to comply with such statutes does not void an otherwise valid search.

State v. Chatriand, 792 P.2d 1107, 1108-09 (Mont. 1990). See also United States v. Klapholz, 17 F.R.D. 18 (S.D.N.Y. 1955) ("'if the search warrant was valid and the original entry lawful, we cannot agree with the contention that the search was rendered unlawful by the mere failure of the officers to leave a copy of the warrant," quoting Giacolone v. United States, 13 F.2d 108 (9th Cir. 1926). Cf. People v. Gifford, 782 P.2d 795, 797, n.2 (Colo. 1989) ("presentment of the warrant prior to the commencement of the search is not an absolute constitutional requirement").

Moreover, defendants rely on plaintiff's own exhibits, attached to the complaint, as prima facie, unrebutted evidence of defendants' objective good faith. It is necessary for plaintiff to put forth evidence establishing an issue of fact regarding the defendants' alleged malicious intent or bad faith. Yet there is no

competent evidence in the record by way of affidavit or otherwise to support the claims.

None of these principles delimiting immunity were addressed by the Court in Hafer, and that case does little to elucidate or elaborate on them.

CONCLUSION

The decision in Hafer stands only for the proposition that officials can be made personally liable in their individual capacities in actions brought pursuant to 42 U.S.C. § 1983. It does not evaluate the merits of a reasonable reliance defense. The holdings of the decision therefore contribute little to decision on the pending motion, since the case before the court does not involve a § 1983 claim, and it raises a claim of reasonable reliance.

DATED January 21, 1992.

BY: C. Wayne Howle
Deputy Attorney General

APPENDIX L

CASE NO. CV-FT-91-034
CV-FT-92-031

IN THE FALLON TRIBAL COURT
IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES
FALLON, NEVADA

FLOYD HICKS,
Plaintiff,

vs.

REBECCA HAROLD, et al.,
Defendant /

ORDER QUASHING SERVICE OF PROCESS AS TO SPECIALLY APPEARING STATE DEFENDANTS

The State Defendants' Motion to Quash Service of Process having come before this Court for decision, a hearing having been held on Marc 3, 1993, on the Fallon Indian Reservation, the presentments of the parties having been considered, the Court deeming itself fully advised in the premised [sic] and good cause appearing;

The Court finds that it is not prevented by doctrines of sovereign or qualified immunity from lawfully exerting personal jurisdiction over the specially appearing State Defendants in this action. The actions of the State Defendants within the exterior boundaries of Fallon Indian country and the decision set forth in National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985), wherein a school district was named in an action in tribal court, is authority relied on by this Court to hold that state immunity defenses do not bar actions against states and state subdivisions, as well as their officers and employees, in tribal courts.

The Court further finds that it is without jurisdiction over the persons of the specially appearing State Defendants for the reason that the Business Council of the Fallon Paiute-Shoshone

Tribes has enacted no procedure for service outside of its territorial jurisdiction by Certified U.S. Mail, rendering any such service void. There being no proof of service on file showing that the Court's service of the specially appearing State Defendants was made on the Fallon Indian Reservation or Colony, or in accordance with Nevada Rules of Civil Procedure (N.R.C.P.), Rule 4, adopted by Tribal Law, service on the specially appearing State Defendants by Certified U.S. Mail fails.

IT IS THEREFORE ORDERED that the State Defendants' Motion be, and hereby is, GRANTED, and that process as to the specially appearing State Defendants is hereby quashed; and that no other relief by granted.

[Signed] Joseph Van Walraven, Tribal Judge.
[Filed] May 5, 1993.